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OCTOBER 2009

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What You

SAY

is What They

GET

A Truth-in-Menu and Menu Labeling Laws Primer

By David T. Denney, Esq.



Texas Beef Brisket

Is this really from a farm-raised animal?

Is your beef really purchased from Texas?

Straight from the Lone Star State, the best Grade-A, farm-raised Angus beef you can buy. Hand-trimmed, hickory-smoked on site, and bursting with flavor. Served with your choice of two sides.....\$15.00

Is this hickory-smoked in your restaurant?

Is this certifiable Grade-A beef?

Hand-trimmed, or precut?

"Truth in Menu" is industry jargon for the loose body of laws that requires restaurants to accurately serve what is described on their menus. The concept itself, however, goes far beyond giving the customer what he thinks he should be getting, touching on issues of false advertising, consumer protection and breach of warranty. Moreover, restaurateurs must keep abreast of laws on the books as well as those likely to be passed at the local, state and national levels.

This article addresses traditional "Truth in Menu" issues, as well as the push for menu labeling and trans fat bans at the local, state and national levels. It will provide an overview and insight into the myriad regulations that govern restaurant menus, and how these legal trends might affect independent operators in the future.

You may well ask if all of the following information is relevant to the independent operator. If you've paid attention to emerging federal and state nutritional disclosure regulations, you might have noticed that the first wave of laws tend to target chains with 20 or more units, perhaps providing single-unit and small-chain operators a sense that they will remain indefinitely exempt from some of this legislation. While we don't pretend to foresee the future, consumer protection laws tend to become more, not less, encompassing. In addition, as consumers become accustomed to receiving this information when dining at chains, they may come to demand it wherever they dine. Thus, staying abreast of these laws is important for all operators.

Truth in Menu in a Nutshell

At their most basic, Truth in Menu laws mandate that restaurants serve what they advertise. Icelandic whitefish cannot be served as grouper. Product origin matters. "Roquefort" cheese should be from Roquefort, France; "Maine Lobster" should, not surprisingly, be from Maine. Ingredients and cooking methods, if described, must be followed.

Enforcement of Truth in Menu laws are relegated to various agencies, and operators should consult their local health board, state consumer affairs department or an attorney familiar with food and beverage law with questions about local regulations. For example, the Los Angeles County Department of Health Services has regulated and enforced Truth in Menu laws since at least the 1970s, with the ability to document violations on the restaurant's Food Official Inspection Report. Inspectors can document violations such as incorrect advertised vs. actual precooked weights and advertising food as fresh, when it was actually frozen.

Fishy business. Florida, for example, has Truth in Menu laws that make it illegal for a restaurant to advertise one species of fish and serve another. The penalty is \$1,000 for each violation. The chain of custody from sea to table is manifold: fishermen, processors, exporters, importers and distributors all potentially handle the fish before the restaurant ever takes delivery. Nevertheless, while other penalties can be imposed on unscrupulous processors, distributors and others who pass one fish off as another, restaurants also bear strict liability. The law simply does not take into account whether the restaurateur knows one fish from another, and there is no safe harbor for an operator who relies on a vendor's representations.

In 2006 and 2007, the Florida Department of Agriculture and Consumer Affairs pursued criminal investigations into distributors and packing plants that intentionally mislabeled Vietnamese catfish as Florida grouper. During that time the Florida attorney general tested fish sold at 24 Tampa-area restaurants as grouper, finding that 17 were actually serving a different species of fish. The moral of this story: Get to know your fishmonger.

The meat of the problem. Another consideration for restaurateurs is how and when they measure the weight or volume of their products. When an operator orders meat sealed at a USDA-regulated meatpacking plant, the contract between the distributor and the restaurant company will normally contain

some sort of net weight allowance. This is necessary because of the "weep" or "purge" of natural juices that pieces of meat experience after being processed. Though a steak weighing 10 ounces leaves the processor, the operator might receive something akin to a steak weighing 9 ounces accompanied by 1 ounce of purged juices. A contractual provision governing allowable +/- weights net of purge allows the parties to reasonably contract for the meat the restaurant wants to serve.

The restaurant's responsibility, though, is to serve the steak it advertises. If a restaurant takes delivery of a steak weighing 9 ounces after purge, but then advertises that steak as "10 ounces" or even as "10 ounces, precooked weight," that restaurant could be in violation of local Truth in Menu laws. The customers don't care what your contract says — they only know what the menu says.

Warranties

If your menu advertises "Florida Grouper," or "12 ounces" or even "fresh from scratch," you are giving your customer a warranty that the product will meet that description. Failure to serve what you promise can be a breach of that warranty. In many states a business that "knowingly" breaches a warranty can be liable for treble damages (three times the plaintiff's actual damages) under consumer protection laws.

The \$1,000 statutory penalty found in Florida's (and many other states') Truth in Menu laws can be a gateway to restaurant liability. In these days of economic uncertainty, restaurateurs must constantly remain on the lookout for scams and "serial plaintiffs" — those who prey upon unsuspecting businesses looking for statutory damages, treble damages and a class-action lawsuit.

A serial plaintiff (working with a tort lawyer) could sue for the statutory penalty, make a claim under the consumer protection statute for treble damages, and then seek out every other person who fell into the same class (e.g., every person who ordered grouper during a specific period) with a newspaper ad or Web site. The potential damages could be great, and the restaurant might never see it coming.

Navigating a Patchwork of Menu Labeling Legislation

With a growing number of the populace facing obesity, diabetes and heart disease, menu labeling has been a hot legislative issue for the past few years. Restaurant organizations such as the National Restaurant Association (NRA) have tried to balance the public interest in health with the potentially great financial burden that menu labeling will place on restaurants across the country.

Menu labeling regulation became a reality at the municipal and state levels when New York City; King County, Washington; and California passed various forms of menu labeling legislation. With restaurant companies facing a future seemingly filled with a patchwork of innumerable labeling standards, the debate has finally reached the national level.

Before discussing the two competing national menu labeling measures, however, it is important to understand federal menu regulations as they exist (and as they may remain, at least in part, after the passage of a new federal menu labeling law).

In 2006 and 2007, the Florida Department of Agriculture and Consumer Affairs pursued criminal investigations into distributors and packing plants that intentionally mislabeled Vietnamese catfish as Florida grouper. During that time the Florida attorney general tested fish sold at 24 Tampa-area restaurants as grouper, finding that 17 were actually serving a different species of fish. The moral of this story: Get to know your fishmonger.

Nutrition and health claims (current law). At the federal level, the Nutrition Labeling and Education Act of 1990 and the rules issued by the U.S. Food and Drug Administration (FDA) govern nutrition and health claims made by restaurants. “Nutrient Content Claims” are direct or implied statements about the level of a substance in a food (e.g., “low sodium,” “low fat” or “contains 100 calories”). For example, a claim that a food is “low fat” may only be made if the item contains less than 3 grams of fat per standard serving. “Health Claims” are direct or implied statements that characterize the relationship of the food or an ingredient to a disease or health-related condition (e.g., a “heart” symbol or “heart healthy” designation).

Once a restaurant makes a claim on its menu it must make nutritional information available to customers upon request. This information may be provided via a brochure, an insert, or orally by a restaurant employee. The restaurant must make a “reasonable basis determination” that the nutrition information it provides to the consumer is correct, and the FDA will look at the recipe, the source of the nutrition information, and the restaurant’s ingredient calculations as the basis for that determination. The FDA will then evaluate whether the basis information and the information provided to customers is consistent with the FDA’s definition for the claim used.

Under the FDA rules, a restaurant is required to keep records sufficient to allow regulatory officials to review on a “reasonable basis” and determine that preparation methods adhere to that basis. (See “Checklist” on Page 28.)

Understanding these existing regulations is important since restaurants will likely continue using descriptors such as “heart healthy,” even after they are required to post caloric or even more complete nutritional information on their menus by new legislation.

Nutrition and health claims (the very near future). Studies cited by proponents of menu labeling suggest that 75 percent or more of Americans support menu labeling. In fact, 17 states have seen various versions of menu labeling legislation introduced in 2009 alone (Oregon, Texas, Oklahoma, Missouri, Indiana, Kentucky, Tennessee, Florida, West Virginia, Maryland, New York, Vermont, Maine, Massachusetts, Rhode Island, Connecticut and Hawaii). None of these measures are exactly the same, however, and some differ greatly. Proposed menu labeling legislation introduced in Florida, for example, would affect all restaurants with five or more units in the state, whereas legislation proposed in Texas would affect only restaurant chains with 20 or more units located in the state. (See “Case in Point” on Page 31.)

MEAL and LEAN

The MEAL Act and the LEAN Act, two competing federal menu labeling bills, differ significantly in how they would address the issue.

Menu Education and Labeling (MEAL) Act. The MEAL Act is a measure that has been introduced several times in the past few years without passage, but since its sponsors have promised to again introduce the measure

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✓ Checklist

Information Required Once a Restaurant Makes a Nutritional Claim

As noted in the main article, once a restaurant makes a claim on its menu it must make nutritional information available to customers upon request. This information may be provided via a brochure, an insert, or orally by a restaurant employee. The restaurant must make a “reasonable basis determination” that the nutrition information it provides to the consumer is correct, and the FDA will look at the recipe, the source of the nutrition information, and the restaurant’s ingredient calculations as the basis for that determination. The FDA will then evaluate whether the basis information and the information provided to customers is consistent with the FDA’s definition for the claim used.

Under the FDA rules, a restaurant is required to keep records sufficient to allow regulatory officials to review on its “reasonable basis” and determine that preparation methods adhere to that basis.

The FDA has provided the following checklist for the information a restaurant should retain, including:

- ✓ A standardized recipe, including the ingredients used and their quantities.
- ✓ Nutrient content data for each ingredient (may include information from the ingredient manufacturer, a reliable database, or other nutrient information source, or a combination of these; information must include data for the nutrients that are the basis for the claim and may include data for other nutrients).
- ✓ The source of the above data (e.g., the name of the database, cookbook).
- ✓ Any assumptions made by the restaurateur or any calculations that were performed that may affect the reliability of the data (e.g., combining data sources, assumed nutrient values, replacing generic or average database values with values for brands used in the restaurant).
- ✓ Serving size (total weight) of the finished food or meal.
- ✓ Total amount of nutrient present per RACC (Reference Amount Customarily Consumed), actual serving, or per 100 grams of food, as appropriate for the definition of the claim.
- ✓ Evidence of staff awareness that reasonably consistent ingredient measurement and portion control are necessary for foods bearing a claim (e.g., training materials, observation of food preparation methods).
- ✓ Presence and use of a standard operating procedure identifying essential parameters in the preparation of a food bearing a claim (e.g., the use of skim milk instead of whole milk, broiling instead of frying, or the need to measure salt instead of salting to taste), when the method of preparation could affect the basis for a claim.

It is important to understand these existing regulations since restaurants will likely continue using descriptors such as “heart healthy,” even after they are required to post caloric or even more complete nutritional information on their menus by new legislation.

in the current legislative session, it must be addressed as a viable candidate for legislative action. The measure is supported in large part by the Center for Science in the Public Interest, a consumer advocacy group.

The MEAL Act (in its 2006 form) would apply to restaurant chains with

20 or more units doing business under the same trade name, and would require those restaurants to disclose the following information adjacent to each item on their menus: calories, grams of saturated and trans fat, and milligrams of sodium. Menu boards would only be required to convey calorie information,

but with a notification that the other nutrition information (fat, sodium and recommended daily allowances) will be made available in writing upon request. The bill would exempt condiments, general-use items and daily specials, but would require the restaurant to post the number of calories per standard serving for each self-serve food item on a buffet or salad bar. Finally, the bill would even require vending machines to display the calories in each item.

A very important and hotly debated part of the MEAL Act that distinguishes it from other federal legislation is that it would give states and municipalities the right to adopt even more stringent requirements, possibly obligating restaurants to make additional nutrition disclosures that differ in each locality. The NRA has taken a stance against the MEAL Act for this reason, arguing that the absence of pre-emption would inevitably result in a hodgepodge of differing regulations across various cities and states.

Labeling Education and Nutrition (LEAN) Act. The LEAN Act is supported by the Coalition for Responsible Nutrition Information, whose members include the U.S. Chamber of Commerce, the NRA and various state restaurant and hospitality associations. Like the MEAL Act, it would apply to chains with 20 or more units doing business under the same trade name.

In contrast to the MEAL Act, though, the LEAN Act would require that calorie information be posted (or included in the menu or an insert) for all menu items featured more than 90 days per year, while also requiring that the menu inform diners that other nutrition information (total fat, saturated fat, cholesterol, sodium, carbohydrates, sugars, dietary fiber, protein) is available in writing, upon request. The LEAN Act does not address nutrition labeling for salad bars, buffets or vending machines.

Arguably the most important feature of the LEAN Act is that it would preempt states and municipalities from enacting menu labeling laws inconsistent with its language. This would eliminate the costly prospect of restaurants providing different nutrition information in different cities, counties and/or states.

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Finally, the LEAN Act includes “safe harbor” protection from frivolous lawsuits against restaurants that may disclose nutrition information but do not purposefully fail to disclose the required information or make a false disclosure with the intent to deceive.

Regardless of whether a federal measure passes soon, menu labeling is an important issue for independent operators as well as for chains. When (not if) national menu labeling legislation is passed, American consumers will become used to seeing nutrition information instantly available from restaurants. If independents and small chains wish to retain market share compared with their larger, chain store rivals, they must look ahead to adopting some type of menu labeling on their own.

Additional Sources:
Past *RS&G* articles available on **RestaurantOwner.com:**

The Food Police —

www.restaurantowner.com/members/818.cfm

He Ain't Heavy He's My Guest —

www.restaurantowner.com/members/544.cfm

Trans Fat Issues

While not technically a “menu labeling” issue, various states and municipalities have moved or are moving to ban the use of trans fats in restaurants. When used in common parlance, the term “Trans Fats” refers to fatty acids created during the partial hydrogenation of vegetable oils, not the trans fats that occur naturally in pomegranates, peas and the milk of cows and goats. Commercial trans fats are used as cooking oils and are found in many processed foods, because the partial hydrogenation increases the usable life of oil and the shelf life of baked goods.

According to reports by the American Heart Association and the Centers for Disease Control and Prevention (among others), trans fats increase the risk of coronary heart disease by causing significant increases in LDL (bad) cholesterol,

Case in Point: The Need for Uniformity

The need for federal legislation that will streamline food labeling laws across the nation can be illustrated by recent legislative activity in Nashville, Tennessee:

- On March 6, 2009, the Nashville Metro Board of Health passed a measure requiring restaurants with 15 or more locations to display calorie information for their menu items. Almost immediately thereafter the measure came under fire from some Nashville metro councilmembers who accused the health board of overstepping its bounds and venturing into the council's legislative territory.
- Meanwhile, the "Tennessee Healthful Menu Act," introduced by Tennessee Gov. Phil Bredesen, was concurrently moving through the state senate. This bill would require chains with 20 or more locations to disclose calorie information on menus.
- Then, in April 2009, various medical and public health organizations (including the American Heart Association and the American Cancer Society) formed the Tennessee Menu Labeling Coalition. In addition to supporting the Tennessee Healthful Menu Act, the coalition said that it would oppose any legislative measure that sought to restrict local governments from enacting their own requirements across the state.

Thus, assuming the governor's bill passes in its current form, Nashville's chain restaurants could be required to wander the following regulatory labyrinth: the Metro Council could overturn the health board measure, only to have a similar measure passed by the state legislature. Then the Metro Council could decide to pass its own, more restrictive ordinance. Add to that the possibility that either the LEAN or MEAL Acts could pass at the national level (discussed in more detail below), and the sum is a confusing morass of city, county, state and national regulations that is in limbo.

along with significant decreases in HDL (good) cholesterol. These studies are widely accepted.

In 2006, the FDA required that trans fat content be listed on the "Nutrition Facts" panel of all food labels, but the movement to ban trans fat usage in restaurants began in Tiburon, California. This was followed by similar programs in New York City, Philadelphia, Boston, Baltimore and Seattle. In 2008, California became the first state to ban trans fats. Bills that would ban trans fats are pending in Hawaii, Washington, Illinois, New York, Massachusetts, Maryland, Texas and Tennessee, as well as the District of Columbia and many other cities.

Restaurateurs who get out in front of pending legislation by eliminating trans fats will set themselves apart,

and may stand to capitalize on the growing market of increasingly health-conscious diners.

Rules Relevant to All Operators

As a practical matter, then, all operators, whether chain or single-unit independents, must remain mindful of current Truth in Menu laws that relate to actual menu descriptions, as well as legislative trends affecting nutritional labeling.

Given the growing consumer interest in nutrition, providing this kind of information will not only help you stay within the law, but could become a business necessity. In addition to avoiding potential liabilities, the growing customer base of well-informed diners will appreciate and reward you for it. **RS&G**

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