New York City food retailers subject to early enforcement of calorie labeling rules

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By: Stefanie Jill Fogel | James N. Czaban | Maggie Craig | Jae Yeon Kim

Despite the recently delayed implementation of the federal menu labeling requirements announced by the FDA on May 4, 2017, New York City Mayor Bill de Blasio issued a press release on May 18, 2017, announcing that all New York City chain food retailers with 15 or more establishments nationwide will be required to comply with New York City's local calorie labeling requirements. The New York City Departments of Health and Consumer Affairs will begin enforcing the calorie labeling requirements on May 22, 2017, first by focusing on educating businesses during regular inspections, and then by issuing notices of violation, which may subject these establishments to fines, beginning on August 21, 2017.

According to the press release, the local rule is expected to affect approximately 3,000 restaurants and about 1,500 retailer chains. Non-compliant retailers and restaurants are subject to fines of $200 to $600 per violation. Notice of violation of the calorie labeling rules will not affect an establishment's letter grade.

New York City had previously passed a restaurant calorie labeling requirement in 2008, but was in the process of repealing and reenacting the local Health Code to ensure the local requirements were parallel to the federal requirements. In anticipation of the federal rule, the New York City Departments of Health and Consumer Affairs had issued a statement clarifying that it “will be preempted from enforcing the Health Code requirements in restaurants subject to the federal regulations” to the extent that the local requirements were not identical to federal...
requirements.

The new local New York City calorie labeling rules, which track many of the federal requirements that have been postponed until May 7, 2018, differ from previous New York City requirements. Under the new requirements, in addition to posting calories, subject establishments must also make additional nutritional information available upon request, including total calories, calories from fat, total fat, saturated fat, trans fat, cholesterol, sodium, total carbohydrates, dietary fiber, sugar and protein. This additional nutrition information can be contained in a counter card, sign, poster, handout, electronic device, booklet, loose-leaf binder, menu or other similar items. In addition, retailers must post two nutrition statements:

- "2,000 calories a day is used for general nutrition advice, but calorie needs vary"
- "Additional nutritional information available upon request"

These nutrition statements must be clearly visible and prominent on menus, menu boards and anywhere else where calorie information is required. For menus, the calorie statement must appear on each page of the menu.

New York City's calorie labeling rules also contain specific information for children's menus. Instead of the 2,000 daily calorie nutrition statement, retailers can replace or add one of the following statements on children's menus:

- "1,200 to 1,400 calories a day is used for general nutrition advice for children ages 4 to 8 years, but calorie needs vary"
- "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"

If the establishment serves multiple-serving menu items, the calories can be listed either for the whole item or for discrete serving units. For combination meals with a choice of two sides, the calories must be posted for each option with a slash separating the two caloric amounts. If a combination meal comes with a choice of three sides, the calories must be posted as a range showing the minimum and maximum calories for all combinations. For menu items with a choice of toppings, calorie counts for the item without toppings must be posted, as well as each topping option must be posted separately. Calories for temporary food items, which are only offered fewer than 60 days per calendar year, do not need to be posted. Also, calories for food items that are offered fewer than 90 consecutive days as part of consumer acceptance testing, do not need to be posted. New York City will also continue to enforce its sodium labeling requirements.

New York City’s announcement and approach raises interesting preemption considerations. The Federal Food, Drug, and Cosmetic Act expressly preempts state or local menu labeling requirements that are otherwise not identical to federal requirements. As mentioned, the New York City Department of Health had previously delayed enforcement of its local requirements pending implementation and enforcement of the federal law and to ensure the local New York City requirements were parallel to federal requirements. Notably, the updated New York City menu labeling requirements are not entirely parallel to the proposed federal requirements (eg NYC’s law applies to those with 15 or more establishments while the federal law applies to those with 20 or more). While the federal requirements are delayed, the federal law has not been repealed and a compliance date has been set for May 7, 2018. Arguably, while the federal law is delayed, states should not be empowered to enforce contradictory state-specific laws. Some states have indicated that they do not intend to take enforcement action against violations pending formal finalization of the federal requirements, which would appear to be consistent with preemptive effect.

However, given the breadth and burdens of the New York City law and the significant federal preemption questions it raises, it seems likely that the city’s enforcement of the law will be challenged in court. If the city’s approach is upheld, other state and local governments may be emboldened to enforce their own labeling laws, leading to patchwork compliance issues that prompted many restaurant chains to ultimately support federal legislation so that food establishments only needed to comply with a single set of requirements. Indeed, the pressure such an outcome could put on the FDA to accelerate the effective date of the federal regulation seems to have factored into New York City's decision to begin enforcing its local requirements. If anything is clear at this point, it is that the menu labeling saga is far from over.

For more information about the menu-labeling requirements, please contact the authors.
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<tr>
<th>AUTHORS</th>
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<tbody>
<tr>
<td>Stefanie Jill Fogel</td>
<td>Partner</td>
<td>Boston</td>
<td>T: +1 617 406 6000</td>
</tr>
<tr>
<td>James N. Czaban</td>
<td>Partner</td>
<td>Washington, DC</td>
<td>T: +1 202 799 4000</td>
</tr>
<tr>
<td>Maggie Craig</td>
<td>Partner</td>
<td>Boston</td>
<td>T: +1 617 406 6000</td>
</tr>
<tr>
<td>Jae Yeon Kim</td>
<td>Associate</td>
<td>Philadelphia</td>
<td>T: +1 215 656 3300</td>
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