

Legal Fact Sheet for Tennessee Food Donation: Date Labeling Laws

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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.” Manufacturers have broad discretion to determine how these dates are selected, and these dates typically reflect quality and taste. Despite this fact, many consumers continue to believe date labels are related to food safety. As a result, date labels can lead to food waste because they are widely misunderstood by consumers and result in safe, wholesome food being needlessly thrown away by both consumers and businesses.

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 In May 2019, FDA released a letter encouraging the food industry to use the phrase “Best if Used by” on food products to indicate quality.⁵
- The USDA does not require date labels on foods under its purview, including meats, poultry, and egg products.⁶ 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.”⁷ 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.⁸ USDA guidance of this kind does not carry the force of law and is merely a recommendation to industry.⁹

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.¹⁰ 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.¹¹

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

Tennessee State Law on Date Labels

Because federal law is limited in scope, states have broad discretion to regulate date labels. As a result, inconsistent date labeling laws exist across the country.¹² Currently, forty- one states and the District of Columbia require at least some foods to have date labels.¹³ These requirements vary with regard to label language and categories of food covered. A number of states require the use of labels only on narrow categories of food. New Hampshire, for example, requires date labels only on pre-wrapped sandwiches¹⁴ and Mississippi only requires date labels on shellfish.¹⁵ Other states have broader regulations, Georgia, for example, requires date labels on eggs, milk, shellfish and prepackaged sandwiches.¹⁶ Twenty states and the District of Columbia also prohibit or otherwise limit the sale or donation of past-date foods.¹⁷

Tennessee is one of the few states that do not regulate date labels on food products and, therefore, doesn’t unnecessarily restrict sale or donation of food products past the date.¹⁸ Food manufacturers are free to decide for themselves which food will and will not display a date label in the state of Tennessee.

Conclusion

Because there is no federal law on date labeling, regulation of these labels has been left largely to the states. However, Tennessee does not require food products to contain date labels. As a result, food manufacturers have the sole discretion to include date labels on food products in Tennessee.

¹ See FOOD PRODUCT DATING, U.S. DEP'T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/wps/portal/fsis/topics/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/fsis/topics/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 Letter from Frank Yiannas, Deputy Commissioner, Food Policy and Response, U.S. Food & Drug Admin., to Food Industry (May 23, 2019), <https://www.fda.gov/media/125114/download>.

⁶ See *id.* 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).

⁷ 9 C.F.R. § 317.8(b)(32) (2018).

⁸ 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/fsis/newsroom/news-releases-statements-transcripts/news-release-archives-by-year/archive/2016/nr-121416-01>.

⁹ See, e.g., *P. Gas & Elec. Co. v. Fed. Power Comm.*, 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”).

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 *Id.*

¹² 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).

¹³ *Id.*

¹⁴ N.H. CODE ADMIN. R. AGR. 1412.04 (2018).

¹⁵ 43-46 MISS. CODE R § 17.

¹⁶ GA. COMP. R. & REGS. 40-2-3-.01, 40-3-1.01, 40-7-1 (2018).

¹⁷ HARVARD FOOD LAW & POLICY CLINIC AND NAT'L RES. DEF. COUNCIL, *supra* note 12, at 12-14.

¹⁸ *Id.* at 14, fig. 4.