

Legal Fact Sheet for Vermont Food Donation: Date Labeling Laws

February 2017

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 because they are misleading to consumers and result in safe, wholesome food being needlessly thrown away.

Federal Law on Date Labels

There currently is no federal law regulating date labels.¹ 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.² Unfortunately, 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.³
- The USDA does not require date labels on foods under its purview, including meats, poultry, and egg products.⁴ 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 “sell by” or “use before.”⁵

Because federal law is so limited, states have broad discretion to regulate date labels. As a result, inconsistent date labeling laws exist across the country.⁶ What has been consistent, however, is food manufacturers’ practice of basing these dates on optimal food quality and freshness, not on food safety.⁷ Despite this fact, many consumers continue to mistakenly believe that these dates are indicators of safety and many report throwing food away once the date passes, due to fear of safety risks.⁸ However, no link has been shown between eating food after its labeled date and foodborne illness.⁹

Vermont State Law on Date Labels

Vermont state law requires date labels on shellfish products and certain foods prepared and packaged in a food establishment.¹⁰ Under Vermont law, packages of raw shucked shellfish must be labeled with a “sell by” date for packages with a capacity of less than 1.87 liters (one-half gallon) or the “date shucked” for packages with a capacity of 1.87 liters (one-half gallon) or more.¹¹ Vermont does not explicitly prohibit the sale or donation of shellfish that is past-date.

Under Vermont law, ready-to-eat¹², potentially hazardous foods¹³ prepared in a food establishment must be labeled at the time of preparation with the date the food¹⁴ must be consumed if the food is held under refrigerated for more than 24 hours after preparation.¹⁵ Additionally, ready-to-eat, potentially hazardous foods prepared in a food establishment and then frozen must be labeled when the food is removed from the freezer with the date the food must be consumed, which is seven days or less after the food is removed from the freezer if the food is maintained at 41° F or less. Vermont law does not require specific date labeling phrases, such as “sell by” on ready-to-eat, potentially hazardous food products. Vermont law explicitly prohibits these products from being sold or donated after the date has passed.¹⁶ Since Vermont only requires date labels on shellfish and the above ready-to-eat products food manufacturers¹⁷ are free to decide for themselves which food will and will not display a date label.

Conclusion

Because there is no federal law on date labeling, regulation of these labels has been left largely to the states and food manufacturers. Vermont law requires date labels only for shellfish and certain ready-to-eat products. Food manufacturers have the sole discretion to include date labels on all other food products in Vermont.



¹ See *Food Product Dating*, U.S. DEP'T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <http://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 February 25, 2015).

² 21 U.S.C.A. § 331(b) (2016); 21 U.S.C.A. § 343 (2016); 21 U.S.C.A. § 463(a) (2016); 21 U.S.C.A. § 607(c)(2016); 21 U.S.C.A. § 1043 (2016).

³ *FDA Basics*, FOOD AND DRUG ADMIN., <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm210073.htm> (last updated Jun. 8, 2015); 21 C.F.R. § 107.20 (2016).

⁴ See *supra* note 1. The USDA does, however, require a “pack date” for poultry and a “lot number” or “pack date” for egg products certified by the USDA. 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* 11 (2013).

⁵ 9 C.F.R. §317.8(b)(32)(i) (2016); 9 C.F.R. § 317.8(b)(32)(2) (2016).

⁶ HARVARD FOOD LAW & POLICY CLINIC AND NAT'L RES. DEF. COUNCIL, *supra* note 4, at 14 fig. 4.

⁷ See *id.* at 17.

⁸ *Id.* at 19.

⁹ See *id.* at 19-20.

¹⁰ 12-5 Vt. Code R. § 30:5-204 (2017).

¹¹ *Id.*

¹² Ready to eat food is defined as “food that is in a form that is edible without washing, cooking, or additional preparation by the food establishment or the consumer and that is reasonable expected to be consumed in that form.” See 12-5 Vt. Code R. § 30.

¹³ Potentially hazardous food means “a food that is natural or synthetic and that requires temperature control because it is in a form capable of supporting: the rapid and progressive growth of infectious or toxigenic microorganisms; the growth and toxin production of *Clostridium botulinum*; or in raw shell eggs, the growth of *Salmonella Enteritidis*.” See 12-5 Vt. Code R. § 30:5-203.

¹⁴ The date of preparation should be “Seven calendar (7) days or less from the day that the food is prepared if the food is marinated at 41° F or less.” See 12-5 Vt. Code R. § 30:5-205 (2017).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Food service establishments should review Vermont's Health Regulations for Food Service Establishments to see if they are exempt or subjects to any date labeling requirements. See 12-5 Vt. Code R. § 30:5-205.