

Legal Fact Sheet

Pennsylvania Food Donation: Date Labels

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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.” 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. However, most date labels are only used to indicate freshness or quality.

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

Pennsylvania Law on Date Labels

In the absence of federal law, states have enacted inconsistent date labeling laws.¹² Food manufacturers generally 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

Pennsylvania regulates date labels on only two categories of food: pasteurized milk and shellfish.¹⁷ With the exception of milk and shellfish, Pennsylvania does not require date labels on food products and does not regulate the sale of food products past labeled dates.

For pasteurized milk, Pennsylvania requires producers to label containers “Sell by” or “Not to be sold after” followed by a date that does “not exceed 17 days beginning after midnight on the day on which the milk was pasteurized.”¹⁸ Pennsylvania prohibits the sale of milk after this date.¹⁹ Exempted from this rule are ultrapasteurized, cultured, and aseptically processed dairy products, as well as “[d]airy products that have undergone higher heat shorter time pasteurization” and milk that is sold in the same location that processed it.²⁰ This 17-day sell by rule is not common among other states and is shorter than the industry standard for milk date labeling, which is between 21-24 days past pasteurization.²¹ Donors should note, Pennsylvania’s Milk Marketing Act may prohibit in-state donation of fluid milk.²²

For shellfish, Pennsylvania requires that dealers “maintain product labeling in compliance with the standards and requirements of . . . the NSSP Model Ordinance and the Food Act.”²³ The NSSP Model Ordinance, published by the FDA, states that dealers shall label each package of “less than sixty-four (64) fluid ounces of fresh or fresh frozen” shucked shellfish with “SELL BY” or “BEST IF USED BY” followed by “a reasonable date when the product would be expected to reach the end of its shelf

life.”²⁴ Packages of over sixty-four fluid ounces of shucked shellfish must include “[t]he words ‘DATE SHUCKED’ followed by the date shucked.”²⁵ Maine does not restrict the donation or sale of past-date shellfish products.

On the local level, additional labeling requirements exist in Pennsylvania. For example, in Allegheny County, the County Health Department regulates the labeling of all “retail refrigerated processed foods packaged in a modified atmosphere.”²⁶ Modified atmosphere packaging increases the quality and longevity of refrigerated foods by making the internal atmosphere of their packaging different from that of the outside air.²⁷ Foods packaged this way must be labeled with a “use by” date that may not exceed 14 days from retail processing; they may not be sold after the “use by” date.²⁸ Therefore, it is important for manufacturers and retailers familiarize themselves with any local or municipal laws that impose additional restrictions on food date labeling or past date sales to ensure compliance.

Conclusion

In sum, because there is no federal law on date labeling, regulation of these labels has been left largely to the states. Pennsylvania has two date labeling regulations that apply only to pasteurized milk and shellfish, 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 *Id.*

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. 1-13 (2003).

¹⁴ See *Id.*; 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).

¹⁵ See EASTERN RESEARCH GROUP, INC., CURRENT STATE OF FOOD PRODUCT OPEN DATES IN THE U.S. 1-13 (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 11 (2011) (study finding no direct evidence linking foodborne illness in the United Kingdom to consumption of food past its expiration date).

¹⁷ 7 PA. CODE § 59a.15.

¹⁸ 7 PA. CODE § 59a.15(a).

¹⁹ 7 PA. CODE § 59a.15(c).

²⁰ 7 PA. CODE § 59a.15(d).

²¹ *Expired?: Food Waste in America*, HARVARD LAW AND POL’Y CLINIC & RACING HORSE PROD. (2016), <http://notreallyexpired.com/watch-the-film/>.

²² 31 PA. CODE § 700j-801

²³ 7 PA. CODE § 49.4 (2018).

²⁴ USDA, NATIONAL SHELLFISH SANITATION PROGRAM (NSSP) GUIDE FOR THE CONTROL OF MOLLUSCAN SHELLFISH: 2017 REVISION, MODEL ORDINANCE X.06(A)(6), 88 (2017), <http://www.fda.gov/Food/GuidanceRegulation/FederalStateFoodPrograms/ucm2006754.htm>.

²⁵ USDA, NATIONAL SHELLFISH SANITATION PROGRAM (NSSP) GUIDE FOR THE CONTROL OF MOLLUSCAN SHELLFISH: 2017 REVISION, MODEL ORDINANCE X.06(A)(7), 88 (2017), <http://www.fda.gov/Food/GuidanceRegulation/FederalStateFoodPrograms/ucm2006754.htm>.

²⁶ HEALTH DEP’T, ALLEGHENY COUNTY, PA., RULES AND REGULATIONS § 329.3 (2015).

²⁷ Examples of food often packaged this way are pre-packaged meats, fruit, produce, and packaged cheese. Food Donations and Labeling Requirements, TRELIS LEGAL, <http://www.trellisphg.com/news/2016/10/3/food-donations-and-labeling-requirements> (last visited Oct. 22, 2018).

²⁸ HEALTH DEP’T, ALLEGHENY COUNTY, PA., RULES AND REGULATIONS § 329.3 (2015).