



Legal Fact Sheet



Michigan 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

Michigan Law on Date Labels

As a result of broad state discretion in the absence of federal law, states have enacted inconsistent date labeling laws.¹² In response to this patchwork regulatory landscape, food manufacturers 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

Michigan requires date labels on prepackaged perishable food and milk or milk products. With the exception of these products, Michigan does not require date labels on food products.

Under Michigan law, retail food establishments are prohibited from selling prepackaged perishable food unless the package bears a label with a date identified by month and day.¹⁷ The date must be the recommended last day of sale, as determined by the person packaging the food or, upon written agreement, by the retailer who purchases the food.¹⁸ Bakery products with a shelf life of seven days or less may instead be labeled with the day of the week they expire.¹⁹ When determining the recommended last day of sale, the date labeler must “establish a meaningful date that takes into consideration the food quality and characteristics of the food, its packaging, and customary conditions encountered in commercial channels.”²⁰ In addition, they must “allow a reasonable period after the date for consumption of the food without physical spoilage.”²¹ If explanatory terms are used before the date on prepackaged perishable items, they must be one of the following: “Sell by,”

“Sell before,” “Last date of sale,” “Recommended last date of sale,” or “Recommended sale date.”²² Prepackaged perishable foods may not be sold after their date label unless they are still “wholesome and sound” and are clearly identified as being past their dates.²³ Prepackaged nonperishable food does not require a date label.²⁴

Michigan also requires producers of milk and milk products to label containers with a recommended last day of sale by month and date.²⁵ When determining the recommended last day of sale, producers must ensure that milk and milk products maintain nutritional levels and do not have a flavor change before the sell-by date.²⁶ Milk and milk products may not be offered for sale after the sell-by date unless they are advertised to the final consumer in a prominent manner as being beyond the recommended last day of sale.²⁷

While Michigan does not require date labels on meat products, it prohibits retail food establishments from selling past-date meat that has been removed from a federally inspected retail package.²⁸

Michigan does not restrict past-date donation of any food products.²⁹

Michigan does not expressly preempt local and municipal labeling laws. Therefore, it is important for manufacturers and retailers to ensure compliance with any local or municipal laws that impose additional restrictions on food date labeling.

Conclusion

In sum, because there is no federal law on date labeling, regulation of these labels has been left largely to the states. Michigan requires date labels on prepackaged perishable food and milk or milk products and restricts the past-date sale of these products as well as meat, 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/ffsis/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) (2019).

³ 21 U.S.C.A. § 331(b) (West 2019); 21 U.S.C.A. § 343 (West 2019); 21 U.S.C.A. § 463(a) (West 2019); 21 U.S.C.A. § 607(c) (West 2018); 21 U.S.C.A. § 1043 (West 2019).

⁴ See FOOD PRODUCT DATING, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/wps/portal/ffsis/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 (2019); 21 CFR § 107.20(c) (2019).

⁵ See FOOD PRODUCT DATING, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/wps/portal/ffsis/topics/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) (2019).

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

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 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 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) (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. 3-2 (2003), http://foodrisk.org/files/Food_Open_Dating.pdf.

¹⁴ See EASTERN RESEARCH GROUP, INC., CURRENT STATE OF FOOD PRODUCT OPEN DATES IN THE U.S. 3-2 (2003), http://foodrisk.org/files/Food_Open_Dating.pdf; 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), <http://ageconsearch.umn.edu/record/14318/files/tr99-01.pdf>.

¹⁵ See EASTERN RESEARCH GROUP, INC., CURRENT STATE OF FOOD PRODUCT OPEN DATES IN THE U.S. 4-11 (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 19 (2011), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/262575/11-1474-use-by-dates-report.pdf (finding no direct evidence linking foodborne illness in the United Kingdom to consumption of food past its expiration date).

¹⁷ Mich. Comp. Laws Ann. § 289.8107(2) (West 2019).

¹⁸ Mich. Comp. Laws Ann. § 289.8107(1)(a) (West 2019).

¹⁹ Mich. Comp. Laws Ann. § 289.8107(7) (West 2019).

²⁰ Mich. Comp. Laws Ann. § 289.8107(6)(a) (West 2019).

²¹ Mich. Comp. Laws Ann. § 289.8107(6)(b) (West 2019).

²² Mich. Comp. Laws Ann. § 289.8107(3) (West 2019).

²³ Mich. Comp. Laws Ann. § 289.8107(4)(b) (West 2019).

²⁴ Mich. Comp. Laws Ann. § 289.8107(2) (West 2019).

²⁵ Mich. Comp. Laws Ann. § 288.539(1) (West 2019).

²⁶ Mich. Comp. Laws Ann. § 288.539(6) (West 2019).

²⁷ Mich. Comp. Laws Ann. § 288.539(9) (West 2019).

²⁸ Mich. Comp. Laws Ann. § 289.8107(4)(a) (West 2019).

²⁹ See, e.g., Mich. Comp. Laws Ann. § 289.8107 (West 2019); see also Mich. Comp. Laws Ann. § 288.539 (West 2019).