

# Legal Fact Sheet

## Mississippi Food Donation: Date Labels

Created by the Harvard Law School Food Law and Policy Clinic, October 2020

Date labels refer to 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 are misleading to consumers and can lead to the increased waste of safe and wholesome food.

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### Federal Law on Date Labels

Currently, there is no federal law regulating date labels.<sup>1</sup> 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.<sup>2</sup> Unfortunately, these agencies have not interpreted this authority as a way to regulate date labels. Thus:

- The FDA does not require date labels on foods other than infant formula.<sup>3</sup>
- The USDA does not require date labels on foods under its purview, such as meats, poultry, and egg products.<sup>4</sup> However, if 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.”<sup>5</sup>

### Mississippi State Law on Date Labels

In the absence of federal date labeling requirements, states have broad discretion to regulate date labels. Consequently, states have enacted inconsistent date labeling laws.<sup>6</sup> Responding to this patchwork regulatory landscape, food manufacturers have consistently labeled foods with

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<sup>1</sup> See *Food Product Dating*, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <http://www.fsis.usda.gov/wps/portal/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating> (last visited September 29, 2020).

<sup>2</sup> 21 U.S.C.A. § 331(b) (West 2018); 21 U.S.C.A. § 343 (West 2018); 21 U.S.C.A. § 463(a) (West 2018); 21 U.S.C.A. § 607(c) (West 2018); 21 U.S.C.A. § 1043 (West 2018).

<sup>3</sup> FDA For Consumers, *Confused by Date Labels on Packaged Foods?*, U.S. FOOD AND DRUG ADMIN. (May 23, 2019), <https://www.fda.gov/consumers/consumer-updates/confused-date-labels-packaged-foods#:~:text=Date%20labels%20are%20generally%20not,the%20date%20they've%20applied.>

<sup>4</sup> 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).

<sup>5</sup> 9 C.F.R. § 317.8(b)(32)(i–ii) (2014).

<sup>6</sup> 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* 11, 14 fig. 4 (2013) (highlighting the substantial variations between state laws).

conservative dates based on optimal food quality and freshness,<sup>7</sup> rather than on food safety.<sup>8</sup> Despite this practice, many consumers continue to mistakenly believe date labels are related to food safety;<sup>9</sup> however, there is no evidence linking post-date consumption to foodborne illnesses.<sup>10</sup>

Mississippi state law only regulates date labels on two categories of food: shucked molluscan shellfish<sup>11</sup> and eggs.<sup>12</sup> With the exception of these products, Mississippi does not regulate other food date labels.

Under Mississippi law, date labels are required on all containers and packages of fresh or frozen raw shucked molluscan shellfish.<sup>13</sup> Packages with sixty-four fluid ounces or more of fresh or frozen raw molluscan shellfish must have a label on both the lid and sidewall or bottom of the package with the term “DATE SHUCKED” and a corresponding date.<sup>14</sup> Packages with less than sixty-four fluid ounces of fresh molluscan shellfish must be labeled with the term “SELL BY” followed by a date not to exceed seventeen days from the date the mollusks were shucked.<sup>15</sup> Containers of frozen shucked molluscan shellfish must include both a label with “DATE SHUCKED” and “DATE FROZEN” followed by the corresponding date and a “PREVIOUSLY FROZEN” date label must be on all refrozen shucked molluscan shellfish.<sup>16</sup> Any molluscan shellfish in violation of these requirements will be subject to confiscation and disposal by the direction of any designated Marine Patrol Officer of the Department of Marine Resources.<sup>17</sup> Any person, firm, or corporation who fails to meet these requirements will have committed a misdemeanor<sup>18</sup> subject to punishment in the form of a fine.<sup>19</sup>

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<sup>7</sup> See 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* 17 (2013); See generally *Food Product Dating*, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <http://www.fsis.usda.gov/wps/portal/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating> (last visited September 29, 2020).

<sup>8</sup> See *FSIS Revises Guidance on Date Labeling to Reduce Food Waste, FSIS Constituent Update*, U.S. DEP’T OF AGRIC., Food Safety and Inspection Service, (Washington, D.C.: Dec. 16, 2016).

<sup>9</sup> 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); See 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* 19 (2013).

<sup>10</sup> 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* 19–20 (2013); 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](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).

<sup>11</sup> 22-17-11 MISS. CODE R. § 100 (LexisNexis 2020).

<sup>12</sup> 2-1.4-04 MISS. CODE R. § 100(1) (LexisNexis 2020); 2-1.4-01 MISS. CODE R. § 108(4)(c)(i)(F) (LexisNexis 2020); MISS. CODE ANN. § 69-7-321 (2020); see also 2-1.4-01 MISS. CODE R. § 108(2)(a) (LexisNexis 2020).

<sup>13</sup> 22-17-11 MISS. CODE R. § 100 (LexisNexis 2020).

<sup>14</sup> 22-17-11 MISS. CODE R. § 100.06 (LexisNexis 2020).

<sup>15</sup> 22-17-11 MISS. CODE R. § 100.07 (LexisNexis 2020).

<sup>16</sup> 22-17-11 MISS. CODE R. § 100.08 (LexisNexis 2020).

<sup>17</sup> 22-17-20 MISS. CODE R. § 102 (LexisNexis 2020).

<sup>18</sup> 22-17-20 MISS. CODE R. § 100 (LexisNexis 2020).

<sup>19</sup> MISS. CODE ANN. § 49-15-63 (2020).

Mississippi law requires eggs offered for sale to be affixed with a date label indicating when the eggs were packed.<sup>20</sup> However, this date label requirement does not apply to either egg producers who sell their eggs directly on their premises or those who sell less than six dozen eggs per week.<sup>21</sup>

Mississippi does not require eggs be affixed with expiration date labels, but does offer guidance to producers should they choose to display such a label.<sup>22</sup> If a producer chooses to include an expiration date on a package of eggs, it must be preceded by either “EXP,” a preprinted statement such as “sell by,” “not to be sold after date on top or end,” or “last sale date on end.”<sup>23</sup> An expiration date may not be later than thirty days from the date the eggs were packed, including the date of pack.<sup>24</sup> Labels with language such as “use before,” “use by,” “best before,” or other similar terms may be used on consumer packages of eggs to indicate the maximum time frame for expected quality, but are also optional.<sup>25</sup> These dates may not exceed forty-five days from the date of pack, including the date of pack.<sup>26</sup>

Beyond specific guidance on particular eggs, Mississippi does not restrict past-date sale or donations of food products. With the exception of the production and sale of eggs on premises and producers selling less than six dozen eggs per week, eggs cannot be sold for human consumption thirty days from the date they were packed, including the date of pack.<sup>27</sup> But, all containers of retail food sold after their stated expiration date must be in “sound condition” and the expired date must be visible.<sup>28</sup> Also, if previously labeled egg cartons are reused for unclassified eggs and sold by a Mississippi egg producer,<sup>29</sup> all labeling of the previous company must be obscured or blackened out and any indication that the eggs are graded by the USDA must be obscured, removed, or blackened out.<sup>30</sup> Relabeling or over-labeling following the aforementioned rules is required on retail products whose original labeling is missing or illegible.<sup>31</sup> It is forbidden to sell containers of food with the label or any mandatory information missing that cannot be identified and relabeled correctly.<sup>32</sup>

Mississippi 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

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<sup>20</sup> 2-1.4-04 MISS. CODE R. § 100(1) (LexisNexis 2020); 2-1.4-01 MISS. CODE R. § 108(4)(c)(i)(F) (LexisNexis 2020); MISS. CODE ANN. § 69-7-321 (1972); *see also* 2-1.4-01 MISS. CODE R. § 108(2)(a) (LexisNexis 2020).

<sup>21</sup> MISS. CODE ANN. § 69-7-321 (1972).

<sup>22</sup> 2-1.4-04 MISS. CODE R. § 100(1) (LexisNexis 2020).

<sup>23</sup> 2-1.4-04 MISS. CODE R. § 100(1) (LexisNexis 2020).

<sup>24</sup> 2-1.4-04 MISS. CODE R. § 100(1) (LexisNexis 2020).

<sup>25</sup> 2-1.4-04 MISS. CODE R. § 100(3) (LexisNexis 2020).

<sup>26</sup> 2-1.4-04 MISS. CODE R. § 100(3) (LexisNexis 2020).

<sup>27</sup> MISS. CODE ANN. § 69-7-321 (1972); 2-1.4-04 MISS. CODE R. § 100(1) (LexisNexis 2020); 2-1.4-01 MISS. CODE R. § 108(4)(d) (LexisNexis 2020).

<sup>28</sup> 2-1.4-01 MISS. CODE R. § 102(3)(c) (LexisNexis 2020).

<sup>29</sup> “Mississippi egg producers” are those with 500 or less laying hens or pullets who sell “unclassified eggs” from his or her own production directly to the consumer off the farm. “Unclassified eggs” are eggs that meet, as a minimum, the U.S.D.A. Grade B Quality Standards. *See* 2-1.4-1 MISS. CODE R. § 108(2)(c) (LexisNexis 2020); 2-1.4-1 MISS. CODE R. § 108(2)(b) (LexisNexis 2020).

<sup>30</sup> 2-1.4-01 MISS. CODE R. § 108(4)(c)(ii) (LexisNexis 2020).

<sup>31</sup> 2-1.4-01 MISS. CODE R. § 102(4)(a) (LexisNexis 2020).

<sup>32</sup> 2-1.4-01 MISS. CODE R. § 102(4)(a) (LexisNexis 2020).

that impose additional restrictions on food date labeling. At this time, no local or municipal date labeling laws have been enacted.

## **Conclusion**

In sum, because there is no federal law on date labeling, regulation of these labels has been left largely to the states. Mississippi requires date labels on all containers and packages with fresh or frozen raw shucked molluscan shellfish as well as eggs. Eggs sold by producers on their own premises or selling less than six dozen eggs per week are exempt from date labeling provisions. Other than these requirements, the state 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, although at this time no local date labeling laws have been enacted.