

Legal Fact Sheet

Virginia Food Donation: Date Labels

Created by the Harvard Law School Food Law and Policy Clinic, April 2024

Date labels are the dates on food packaging that are accompanied by phrases such as “use by,” “best before,” “sell by,” “enjoy by,” or “expires on.” Although most date labels are only used to indicate freshness or quality, they 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.

Federal Law on Date Labels

There is currently no federal law regulating date labelsⁱ with the exception of infant formula.ⁱⁱ 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.ⁱⁱⁱ 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.^{iv}
- The USDA does not require date labels on foods under its purview, including meats, poultry, and egg products.^v 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.”^{vi} USDA revised its date labeling guidance in 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.^{vii} USDA guidance of this kind does not carry the force of law and is merely a recommendation to industry.^{viii}

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.^{ix} 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.^x

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.^{xi}

Virginia Law on Date Labels

As a result of broad state discretion in the absence of federal law, states have enacted inconsistent date labeling laws.^{xii} In response to this patchwork regulatory landscape, food manufacturers label foods with conservative dates based on optimal food quality and freshness,^{xiii} rather than on food safety.^{xiv} Despite this practice, many consumers continue to mistakenly believe date labels are related to food safety;^{xv} however, there is no evidence linking post-date consumption to foodborne illnesses.^{xvi}

Virginia's date labeling requirements are limited; it imposes them only on dairy^{xvii} and shellfish.^{xviii} Beyond these products, Virginia does not generally require date labels on food products.

For dairy products, Virginia regulates both the formatting of date labels and the process through which those dates are determined.^{xix} Virginia requires a "sell by" date label on all packages and containers of dairy products, indicating the date after which the product should not be sold.^{xx}

Virginia also imposes date labeling requirements on shellfish. Raw shucked shellfish must be packaged with labeling that either contains a "sell by" or "best if used by" date for small packages (less than one-half gallon).^{xxi} For shellfish packages one-half gallon or larger, a legible label must also identify the date shucked.^{xxii}

Virginia law explicitly states that a food donor or food bank is not liable for donating or distributing food past the best-by date. Virginia law also protects donations of food with non-safety related flaws so long as the food is labeled to ensure that recipients are aware that the food does not meet all labeling and date requirements.^{xxiii}

Conclusion

In sum, because there is no federal law on date labeling for products other than infant formula, regulation of these labels has been left largely to the states. Virginia requires date labels on dairy products and restricts the past-date sale of these products, while also requiring date labels for raw shucked shellfish. 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.

ⁱ See FOOD PRODUCT DATING, U.S. DEP'T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/food-safety/safe-food-handling-and-preparation/food-safety-basics/food-product-dating> (last visited March 2, 2023).

ⁱⁱ 21 CFR § 107.20(c) (2019).

ⁱⁱⁱ 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).

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- ^{iv} See FOOD PRODUCT DATING, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/food-safety/safe-food-handling-and-preparation/food-safety-basics/food-product-dating> (last visited March 2, 2023); 21 C.F.R. § 107.20 (2019); 21 CFR § 107.20(c) (2019).
- ^v See FOOD PRODUCT DATING, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/food-safety/safe-food-handling-and-preparation/food-safety-basics/food-product-dating> (last visited March 2, 2023). The USDA does, however, require a “pack date” for poultry and a “lot number” or “pack date” for egg products certified by the USDA, with expiration dates being optional. See U.S. DEP’T OF AGRIC., AGRIC. MKTG. SERV., QAD 700, SHELL EGG GRADERS PROCEDURES, 708.5 (2022).
- ^{vi} 9 C.F.R. § 317.8(b)(32) (2019).
- ^{vii} 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/news-events/news-press-releases/usda-revises-guidance-date-labeling-reduce-food-waste>.
- ^{viii} 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”).
- ^{ix} See *Grocery Industry Launches New Initiative to Reduce Consumer Confusion on Product Date Labels*, CONSUMER BRANDS ASSOC. (Feb. 15, 2017), <https://consumerbrandsassociation.org/posts/grocery-industry-launches-new-initiative-to-reduce-consumer-confusion-on-product-date-labels/>.
- ^x See *Grocery Industry Launches New Initiative to Reduce Consumer Confusion on Product Date Labels*, CONSUMER BRANDS ASSOC. (Feb. 15, 2017), <https://consumerbrandsassociation.org/posts/grocery-industry-launches-new-initiative-to-reduce-consumer-confusion-on-product-date-labels/>.
- ^{xi} See, e.g., U.S. CONST. amen. X.
- ^{xii} 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).
- ^{xiii} See FOOD PRODUCT DATING, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/food-safety/safe-food-handling-and-preparation/food-safety-basics/food-product-dating> (last visited March 2, 2023); 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.
- ^{xiv} 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>.
- ^{xv} 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).
- ^{xvi} 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).
- ^{xvii} 2 VA. Admin. Code § 5-531-60.
- ^{xviii} 12 VA. Admin. Code §§ 5-421-400; and 2 VA. Admin. Code § 5-585-400.
- ^{xix} 2 VA. Admin. Code § 5-531-60.
- ^{xx} 2 VA. Admin. Code § 5-531-60.
- ^{xxi} 12 VA. Admin. Code § 5-421-400.
- ^{xxii} 12 VA. Admin. Code § 5-421-400.
- ^{xxiii} VA. Code § 3.2-5144. For more information on liability protection for Virginia food donors, see FLPC’s Legal Fact Sheet on liability protection.