

Legal Fact Sheet

New Jersey 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

New Jersey 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

New Jersey’s date labeling requirements are limited; it imposes them only on dairy and shellfish.¹⁷ Beyond these products, New Jersey does not require date labels on food products.

For dairy products, New Jersey regulates both the formatting of date labels and the process through which those dates are determined. In New Jersey, all “fluid milk products” – including yogurt and creams – are subject to date labels.¹⁸ Unless the product is hermetically sealed and sterilized, the packaging must have either the words “NOT TO BE SOLD AFTER” or “SELL BY” (or another “clearly understandable legend approved by the department”), followed by an abbreviated month and date.¹⁹ In determining the sell-by date, the manufacturer must notify New Jersey regulators of its intended date and make available the basis for that date upon request; regulators reserve the right to impose a moratorium on the sale of the product if they are unsatisfied either with the intended date or the methodology by which it was determined.²⁰ Most

importantly, dairy products cannot be sold past the sell-by date in New Jersey.²¹ However, the New Jersey Food Bank Good Samaritan Act allows for donation of these foods past its sell-by date.²²

New Jersey also imposes date labeling requirements on shellfish. Raw shucked shellfish must be packaged with labeling that either contains a sell-by date (if the package is less than one-half gallon) or the date on which the shellfish was shucked (if the package is one-half gallon or larger.)²³

New Jersey places no restrictions on past-date donation of food items under the Food Bank Good Samaritan Act.²⁴

Conclusion

In sum, because there is no federal law on date labeling, regulation of these labels has been left largely to the states. New Jersey requires date labels on prepackaged perishable food and milk or milk products and restricts the past-date sale of these products, while also requiring date labels for raw shucked 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/fsis/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/fsis/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/fsis/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/fsis/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/fsis/topics/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 N.J. Stat. Ann. § 24:10-57.23 (2016); N.J. Admin. Code. § 8:24-3.2 (2007).

¹⁸ N.J. Stat. Ann. § 24:10-57.23 (2016).

¹⁹ N.J. Stat. Ann. § 24:10-57.23 (2016).

²⁰ N.J. Stat. Ann. § 24:10-57.23 (2016).

²¹ N.J. Stat. Ann. § 24:10-57.23 (2016).

²² For more on liability protection for New Jersey food donors, see FLPC's Legal Fact Sheet on liability protection.

²³ N.J. Admin. Code. § 8:24-3.2(n)(ii) (20 07).

²⁴ For more on liability protection for New Jersey food donors, see FLPC's Legal Fact Sheet on liability protection.



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