

PUBLICATION

Congress Considers National Menu Nutrition Disclosure Standard for Chain Restaurants

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Before Congress adjourned on August 7, key committees in the House of Representatives and the Senate inserted into controversial health care reform legislation identical language that would establish national menu labeling standards for chain restaurants (defined as restaurants with 20 or more locations). The menu labeling language in the pending health reform legislation (H.R. 3200 in the House; bill unnumbered in the Senate) is a modified version of legislation supported by the restaurant industry-backed Coalition for Responsible Nutrition Information (CRNI), called the Labeling Education and Nutrition (LEAN) Act. The modified version of the LEAN Act is a product of bipartisan negotiations between, on one hand, advocates of more detailed nutrition disclosure by chain restaurants and, on the other, lawmakers who agreed with the restaurant industry's approach to the issue.

To become law, the legislation will have to be passed on the House and Senate floors in identical form before being presented to President Obama for signature. However, because the outcome of health care legislation in the current session of the 111th Congress is highly uncertain, the compromise menu labeling provisions could instead be considered in the House and Senate as a "free-standing" bill. While the political environment appears ripe for congressional enactment of the menu labeling compromise, the final outcome will still largely depend on the congressional calendar and competing legislative priorities in the current session of Congress.

Compromise Legislation

The compromise legislation is an outcome of efforts by chain restaurants to combat an increase in state and municipal laws mandating the disclosure of food nutrition information to consumers as a way to promote health and reduce obesity. The restaurant industry has taken the position that such state and local mandates impair interstate commerce and violate the First Amendment right to commercial speech. However, in 2008, the restaurant industry lost a major legal battle against state and municipal laws mandating nutrition information disclosure on menus. In *New York State Restaurant Association v. New York Board of Health* (545 F. Supp 2d. 363, S.D.N.Y. 2008), the federal district court ruled that while the Nutrition Labeling and Education Act (NLEA) of 1990 preempted state and local governments from regulating nutritional claims made by restaurants, it did not preempt them from mandating nutrition *information* disclosure on printed menus and menu boards. The district court's ruling was subsequently affirmed by the U.S. Court of Appeals for the Second Circuit on February 17, 2009.

Faced with the prospect of dealing with multiple nutrition disclosure laws in multiple state and municipal jurisdictions, the National Restaurant Association (NRA) helped form CRNI. CRNI successfully sought support in Congress for the LEAN Act, which would establish national nutrition labeling standards for the chain restaurant industry and preempt state and local regulation in this area. The compromise menu labeling provisions in the House and Senate health reform legislation contain two key objectives sought by the Coalition in the LEAN Act: (1) to only require the printing of caloric information on menus and menu boards (as opposed to the full litany of nutritional information required by NLEA) and (2) the preemption of state and municipal regulations that conflict with national labeling standards.

Key Elements

The compromise legislation approved by both House and Senate committees as part of health care reform legislation would do the following:

Restaurants with 20 or more locations would be required to disclose on a menu, menu board or drive-thru board the number of calories per standard menu item, a statement concerning suggested daily caloric intake, and a statement regarding the availability of additional nutrition information upon request (including trans fats, saturated fat, sodium, cholesterol, carbohydrates, sugars, dietary fiber and protein). Hence, instead of having to disclose all nutrition-related information on menus and menu boards, the compromise legislation would only mandate the disclosure of calories. All additional nutritional information would be provided in a written statement maintained on the premises of the restaurant in question and available upon the request of the customer.

It would amend NLEA to specifically establish a national standard for nutrition labeling of food sold in chain restaurants with 20 or more locations from which state/municipal laws could not deviate. However, the compromise legislation does permit state and local requirements "respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food."

The compromise legislation does not enumerate specific penalties to be assessed in the case of one or more violations. However, under NLEA and accompanying regulations, the general penalty for the first violation can be up to one year in prison or a fine of not more than \$1,000, or both. For recurring violations or violations where there was an "intent to defraud or mislead" the penalty rises to three years in prison or a fine of not more than \$10,000.

A key element of the compromise legislation is the limit on liability for restaurants that disclose inaccurate nutritional information. Three provisions have been inserted into the legislation intended to limit liability of restaurants for such errors. One provision would require the Food and Drug Administration (FDA) to issue rules establishing the types of information (the "reasonable basis") that restaurants should rely on when determining the nutritional information required to be disclosed. A second provision would require FDA to issue regulations that establish the "permissible variations" in such things as serving size, recipes, ingredients, the methods of food preparation, and the spacing and formatting of menus and menu boards. FDA regulations would also address what constitutes "inadvertent human error" for purposes of determining whether the violation was intentional.

It should also be noted that while the majority of members of the International Franchise Association (IFA) and the NRA support the compromise legislation, there are members of both organizations who believe the "20 location" threshold will be detrimental to their companies. These members advocate instead an income/revenue threshold for determining which chain restaurants should be subject to the federal legislation.

Effective Date

The menu labeling bill does not contain an effective date mandating when the menu labeling standards will go into effect. FDA would be required to issue proposed regulations within one year of the law's enactment regarding permissible variations of food preparation and menus and what constitutes "inadvertent human error."

For more information about pending menu legislation and clarification of the issues FDA will address in regulations it will promulgate as required by the proposed legislation, please contact this article's authors.