



THE LAW OFFICES OF DAVID T. DENNEY

A PROFESSIONAL CORPORATION

As the dust settles around the fierce 2009-2010 debates concerning healthcare legislation and the ink dries on the new law signed by President Obama on March 30, 2010, hospitality companies remain curious about the impact of the “menu labeling” portion of the law. Buried deep within the “Patient Protection and Affordable Care Act” (P.L. 111-148) is Section 4205, “Nutrition Labeling of Standard Menu Items at Chain Restaurants and Articles of Food Sold from Vending Machines.”

Though various studies debate the effectiveness of menu labeling on consumer behavior, menu labeling is upon us. This is a short primer to help you understand the intricacies of the measure.

Does this Apply to My Company?

The Act amends the FEDERAL FOOD, DRUG AND COSMETIC ACT (21 U.S.C. 343(q)(5)(A)), with specific application to any restaurant or foodservice establishment “that is part of a chain with 20 or more locations **doing business under the same name (regardless of the type of ownership of the locations)**” and offering “substantially the same menu items.” Simply put, the law applies to all chains of 20 units with the same name. For example, if there are four franchisees owning 5 restaurants each, all the owners must comply with the tenets of the Act. On the other hand, for a sole owner (or operating company) with 10 restaurants under one trade name and 10 restaurants under a different trade name, the law would probably not apply.

These rules apply to “standard” menu items only, which exclude any item that appears on the menu fewer than 60 days per year and food that is part of a “market test,” appearing on the menu fewer than 90 days. The rules do not apply to condiments.

Will We Have To Keep Track Of State And Local Menu Labeling Initiatives As Well?

Importantly, the Law contains a provision that specifically preempts any State or local law, rule or ordinance. The National Restaurant Association put it nicely in their March 22, 2010, press release on the Act: “This legislation will replace a growing patchwork of varying state and local regulations with one consistent national standard”

What Information Must We Provide To Our Guests, And Where Do We Put It?

Salad bars, buffets, cafeteria lines and other self-service venues must provide, adjacent to each food and beverage item, the calories per item or per serving.

On the menu, menu board or drive-through menu board, “so as to be clearly associated with the . . . item,” the restaurant must provide the number of calories contained in each menu item as it is “usually prepared and offered for sale.”

The menu/menu board itself must also provide a short statement, “posted prominently,” describing the suggested recommended daily caloric intake and informing the guest that additional nutrition information is available in writing, upon request.

That written information must include:

1. the total number of calories in each serving size (or other unit of measure of the food):
 - a. derived from any source, and
 - b. derived from the total fat,

2. the amount of the following nutrients in each serving size (or other unit of measure of the food):
 - a. Total fat,
 - b. saturated fat,
 - c. cholesterol,
 - d. sodium,
 - e. total carbohydrates,
 - f. complex carbohydrates,
 - g. sugars,
 - h. dietary fiber, and
 - i. total protein.

In the event the data shows “insignificant amounts” eight or more of these nutrients, the data may be presented in a simplified form. Insignificant amounts means an analysis that results in “zero” for labeling purposes, or, in the case of carbohydrates, dietary fiber and protein, an amount of “less than 1 gram.” (The rules governing the measurement and determination of “insignificant amounts” are complex, and should be carefully reviewed before nutritional information is provided in writing.)

Expect regulations in the future from the Secretary of Health and Human Services “for determining and disclosing the nutrient content for standard menu items that come in different flavors, varieties, or combinations, but which are listed as a single menu item, such as soft drinks, ice cream, pizza, doughnuts, or children’s combination meals.”

How Do We Obtain This Nutritional Information?

The foodservice establishment must have a “reasonable basis” for its nutrition disclosures. The most specific means, of course, would be to have a laboratory analysis of each menu item. The law also allows the restaurant to establish its reasonable basis by using “nutrient databases, cookbooks” or “other reasonable bases that provide assurance that the food” conforms to the restaurant’s disclosure.

Does The Act Apply Only To Calories?

Yes, though the Act states that the Secretary of Health and Human Services determines that additional nutrients should be disclosed in the written information, such change can be made by issuing additional regulations.

Does the Act Require Nutrition Labeling Of Any Other Food?

For a person or company engaged in the business of owning/operating 20 or more vending machines, the operator must disclose calories for each item in a clear and conspicuous manner.

What Is The Timeline For This Law To Take Effect?

The Secretary is required to propose regulations within 1 year from the date of passage.

What Now?

Time is short, so get ready now. Start sourcing the nutritional analyses you need, because as the effective date draws near labs across the country will likely be backed up with procrastinators looking to get caloric information.

My \$.02: Menu labeling is here, so embrace it. Consider it another way to touch the customers and connect with your guests to enhance their dining experiences.

Access the [full text](#) of the law here.

© 2010, David T. Denney, all rights reserved. This article is not intended to provide specific legal advice, nor does your enjoyment of the article create an attorney-client relationship with the Firm. Please contact an attorney knowledgeable in the hospitality arena should you have any specific questions.

THE LAW OFFICES OF DAVID T. DENNEY, PC represents hospitality clients in various types of litigation, and counsels them on such matters as the formation, purchase and sale of business entities, private placements of securities, commercial leases, foodborne illness and allergy liability, employment matters and beverage alcohol licensing.

David T. Denney
3102 Maple Ave., 4th Floor
Dallas, Texas 75201
d: 214.800.2319
david@foodbevlaw.com
www.foodbevlaw.com