



Creating Successful Healthy Restaurant Policies

Understanding the Laws Regulating Restaurants

This publication gives a brief description of the federal, state, and types of local laws that regulate restaurants. It also provides examples of policies that communities may adopt, and suggests recommendations for drafting policies that comply with the regulatory framework.

Concerned about the obesity epidemic and the related health implications and costs, communities around the country are looking at ways to encourage healthier eating. More than two-thirds of adults and nearly a third of children are overweight or obese.¹ On average, Americans eat as many as a third of their meals in restaurants.² Consequently, communities are looking for strategies to improve the health of the food offered in restaurants.

A growing number of communities have adopted or are considering policies to increase the availability of healthier food at restaurants. Some cities have selected a legislative or regulatory approach. For example, prior to the adoption of the Affordable Care Act – which mandates that chain restaurants provide nutrition information to consumers – New York City, San Francisco, and Philadelphia adopted laws requiring certain restaurants to disclose calorie counts on menus. Other cities have used their zoning power to limit the availability of fast food. Los Angeles recently adopted a zoning law that restricts the density of stand-alone fast food restaurants in an area within the city. Concord, Mass., and Calistoga, Calif., have banned fast food restaurants entirely.

Other communities have focused more on programmatic efforts. Somerville, Mass., for example, has implemented a “healthy restaurant program,” offering incentives to restaurants that agree to provide consumers with a certain number of entrées that meet particular health standards. In exchange for offering consumers the healthier meals, restaurants receive benefits, such as training and free publicity.

Regardless of the approach, community members need to understand the regulatory framework that governs restaurants so their approach conforms to the law. Restaurants are regulated by federal, state, and local laws. Understanding this framework can ensure that communities adopt strategies that comport with the law and therefore have a stronger likelihood of success.

Federal Law

Food, Drug, and Cosmetic Act

The Food, Drug, and Cosmetic Act (FDCA), enacted in 1938, generally prohibits the misbranding or mislabeling of food. In 1990, Congress adopted the Nutrition Labeling and Education Act (NLEA), which amended the FDCA by clarifying and strengthening the Food and Drug Administration’s (FDA) legal authority to: (1) require general nutrition labeling on foods, specifying what and how nutritional information must be disclosed, and (2) establish the circumstances under which particular nutrient and health claims may be made about food.³ Most consumers are familiar with the general nutrition labeling requirements from the Nutrition Facts charts required on most prepackaged food. As described below, some of the FDCA’s provisions apply to restaurants.

Nutrition Labeling: Federal Calorie Disclosure Law

Until recently, the FDCA’s general nutrition labeling provisions did not apply to restaurants. The Affordable Care Act amended the FDCA to require new nutrition disclosure requirements for certain restaurants and vending machines.⁴ The law applies to chain restaurants or similar retail food establishments that have at least 20 locations doing business under the same name (regardless of the type of ownership of the locations) and offering substantially the same menu items for sale.⁵ These restaurants must:

- List the number of calories for every standard menu item and suggest total daily calories on a menu, menu board, or drive-through menu board;
- List the calories per serving next to each item, if the food is provided at a salad bar, buffet, cafeteria, or similar self-service facility (including self-service beverages); and
- Make available, through a brochure, poster, or other means, additional serving size information, including: the total number of calories, calories derived from fat, the amount of total fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, dietary fiber, total protein, and any additional nutrient information identified by the Secretary of Health and Human Services as necessary for consumers to make healthy choices.⁶

On April 6, 2011, the FDA solicited public comments for its proposed rule implementing the new law.⁷ On May 24, it issued some technical corrections to the proposed rule.⁸ The FDA is expected to issue the final rule in 2012.

The law expressly prohibits or preempts state and local governments from imposing any requirements for the nutrition labeling of food that are not identical to the FDCA’s requirements for the chain restaurants covered by the Act.⁹ Thus, states and cities may impose laws that are identical to the federal law, but may not require chain restaurants with at least 20 outlets to post any nutritional information on their menus that differs from what is required by the FDCA. The law does not prohibit state and local governments from imposing nutrition labeling requirements on restaurants that are not covered by the Act, but it allows any such

entity to formally opt in to these requirements (and therefore, opt out of any state or local law).¹⁰ The FDA has issued guidance detailing the procedure for voluntary registration.¹¹

The FDCA contains enforcement provisions to ensure that food is not mislabeled. Generally, the FDA may enjoin sales of the food or pursue civil or criminal penalties.¹² Federal law allows states to take action against mislabeled food in their jurisdiction, but they must give at least 30 days notice to the FDA before proceeding.¹³ These enforcement mechanisms existed prior to the adoption of the menu-labeling provisions and were not designed specifically to address menu labeling.

Nutrient-Content and Health Claims

The FDCA also regulates labeling on foods that makes particular nutrient or health claims.¹⁴ Any restaurant that makes nutrient-content or health claims about food on its menus, posters, or signs must comply with the requirements spelled out in the FDCA and its regulations.¹⁵ These requirements, which existed prior to the recent reform, apply to *all* restaurants (members of a chain or not).

Nutrient-Content Claim

A nutrient-content claim is a labeling claim that expressly or by implication “characterizes the level of any nutrient.”¹⁶ (The mandatory nutrition labeling disclosures themselves, required of chain restaurants, are not considered nutrient-content claims.¹⁷) The FDA regulations specify what terms may be used when making a nutrient-content claim and what nutrient content must be present in the food in order to use the term.¹⁸ Thus, when a restaurant makes a nutrient-content claim on its menu, such as that an item is “low-fat,” it must comply with the FDCA’s nutrient-content claims requirements for restaurants.¹⁹ Upon request, the restaurant must disclose the nutrition information that is the basis for the claim – for example, that “low-fat” means “this meal contains 10 grams of fat.”²⁰

Restaurants may determine the nutrient levels of the food they serve by using nutrient databases, cookbooks, analyses, or other reasonable bases that provide assurance that the food meets the nutritional requirements for the claim.²¹ Currently, the FDA does not dictate standardized type, size, or placement requirements for presenting information that supports a nutrient claim, but states, “[l]abeling that is easily accessible to consumers, that contains all required nutrition information, and that is presented clearly and legibly” would conform to its requirements. When the FDA issues the final regulations implementing the menu-labeling provisions, it could make additional changes to these regulations.

Health Claim

A health claim is a claim on a food label that expressly or by implication, including third-party references, written statements, or symbols, “characterizes the relationship of any substance . . . to a disease or a health-related condition.”²² (The FDCA uses the term “substance” to mean a specific food or component of food.) For example, the FDA considers using the term “heart-healthy” next to an entrée on a menu to be a health claim. It contains the two required elements: (1) a reference to a nutrient or substance – the nutrients in the entrée, and (2) a reference to a disease or health-related condition – heart disease.²³ Similarly, the use of a heart symbol constitutes an implied health claim.²⁴

The FDCA strictly regulates when a substance may be eligible for a health claim, what nutrient content must be present in the food to make the claim, and what nutrient information a restaurant must disclose in reference to the health claim.²⁵ A restaurant may not make a health claim for foods that exceed specified levels of total fat, saturated fat, cholesterol, or sodium.²⁶ The FDA authorizes a health claim only when it determines, based on the totality of publicly available scientific evidence, that there is significant scientific agreement among qualified experts that the claim is supported by evidence.²⁷

State and Local Laws

State and local governments also regulate restaurants. The extent to which a city or county can pass laws regulating restaurants depends on the extent of the *police power* – the power of the government to regulate private conduct to protect and further the public’s health, safety or general welfare – granted under its state constitution or statutes. Because of variations in state law, some of the following types of laws may be passed at the state level, while others may be passed at the local level.

State Retail Food Codes

All states have laws setting health and safety standards for restaurants. Forty-nine states have laws based on the FDA’s model Food Code versions from 1993 or later.²⁸ Updated most recently in 2009, the model Food Code uses the latest scientific evidence to set forth sanitation and food-handling requirements for restaurants, retail food stores, vending operations, and food service operations in institutions such as schools, hospitals, nursing homes and child care centers.²⁹ Briefly, the model code establishes definitions; sets sanitation standards for personnel, food operations, and equipment and facilities; and provides for food establishment plan review, permit issuance, inspection, and permit suspension.³⁰

State legislatures adopt the model Food Code either “as is,” or with changes. Although the food codes are state law, they are frequently implemented at the local or regional level through county health, agriculture, or similar agencies. Restaurants apply to their local county health department or other designated agency for an operating permit. The local environmental health officer (or comparable employee) is responsible for inspecting the restaurant, ensuring that employees have received proper food safety training, monitoring compliance, and enforcing the law.

State Food, Drug and Cosmetic Acts

Some states have adopted their own food, drug, and cosmetic acts. California, for example, adopted the Sherman Food, Drug, and Cosmetic Act, with provisions that are identical to the FDCA.³¹ Under the law, California can enforce regulations related to mislabeled or misbranded food within its borders.³² In addition, the California department of health can authorize local county health departments to enforce the regulations relating to retail food establishments, including restaurants.³³

Zoning Laws

Cities and counties use zoning and other land use measures to regulate growth and development in an orderly manner. Zoning divides an area into districts and determines how the land in each district may be used. State laws give most cities and counties the power to enact zoning laws. Many use that power to regulate where restaurants may locate.

Other Operating Licenses or Permits

Most communities require restaurants to obtain additional permits or licenses to operate. In some communities, state law determines the type of permits or licenses; in others, a mix of state and local law does so. For example, a restaurant may need a business license, a fire inspection clearance or permit, a building permit, a particular type of waste permit, or other type of license.

Other Local Laws Affecting Restaurants

State and local laws also may regulate other health and environmental aspects of restaurants. Many states ban smoking in restaurants.³⁴ In states that do not ban smoking, cities that are empowered to do so have banned smoking.³⁵ California restricts restaurant use of trans fats, as does New York City.³⁶ Some communities have other laws regulating restaurant environments. For example, Honolulu requires restaurants to recycle or compost their waste,³⁷ and San Francisco prohibits restaurants from serving take-out food in containers made of polystyrene foam.³⁸

Finally, some communities have laws encouraging restaurants to serve healthier food. NPLAN has a model ordinance requiring restaurants that give away toys with children's meals to meet certain nutrition standards. NPLAN's *Model Ordinance for Healthier Toy Giveaway Meals*, is available at: www.changelabsolutions.org/publications/healthier-toy-giveaway-meals. Santa Clara County, Calif., enacted an ordinance based on NPLAN's model.³⁹ Watsonville, Calif., requires new restaurants to contain certain healthy food options in order to obtain a building permit.⁴⁰

Policy Recommendations

Establish a Healthy Restaurant Recognition Program

A number of states and communities have adopted or are considering adopting restaurant recognition programs to encourage restaurants to offer healthier fare to consumers. Restaurants choose to participate in the program. These programs generally require restaurants to offer a certain number of menu items that meet established nutritional standards. The healthy items are identified as such on the menu. In exchange, these programs offer restaurants free publicity, nutrition training, nutrition analysis of menu items, and other benefits. NPLAN's toolkit to help communities establish a healthy restaurant program, *Putting Health on the Menu: A Toolkit for Creating Healthy Restaurant Programs*, is available at: www.changelabsolutions.org/publications/healthy-menus.

Restaurant recognition programs are unlikely to be considered preempted by the federal law. As described above, the federal law prohibits states and political subdivisions of states from establishing "any requirement" for nutrition labeling of food for restaurants of chain of 20 or more outlets.⁴¹ Restaurant recognition programs are voluntary programs; restaurants choose whether to participate in the programs. Once they choose to participate, they may be contractually bound to follow the program requirements – which may include labeling on the menu to inform customers that designated entrées meet certain nutrition standards. But, because the programs are not mandatory, they do not impose a requirement that is likely to fall within the federal law's preemption clause.

Because all restaurants, however, are subject to the nutrient and health claim requirements of the FDCA, it is important that health departments design their restaurant recognition programs to be consistent with the law's requirements. While the FDA has issued guidance on the application of the FDCA to restaurants, it decides whether a statement is a nutrient or health claim on a case-by-case basis.⁴² Thus, there is no guarantee that a community's restaurant program would be exempt from FDA scrutiny. As a result, when implementing a healthy restaurant recognition program, the safest course is to assume that any identification of healthy entrées on the menu would be considered at least a nutrient claim and possibly a health claim as well. Accordingly, the programs should:

- Use established nutrition standards, such as those contained in the U.S. Dietary Guidelines for Americans, to determine what qualifies as a healthy menu item, side dish, or beverage;⁴³
- When using a dietary guideline based on specific levels for intake of a nutrient based on total daily consumption, divide the total by four (three meals and a snack per day) to determine the appropriate value for an individual meal;⁴⁴
- Use symbols such as a star or check, not a heart, to identify the healthy menu items;⁴⁵
- Ensure that proper nutrition analysis—using nutrient databases, cookbooks, analyses, or other reasonable means—support any menu item identified as consistent with the program's nutrition standards;⁴⁶
- Ensure that restaurants make nutrition information related to the identified menu items available in writing to consumers;⁴⁷
- Ensure that no identified entrees exceed the FDA-specified levels of total fat, saturated fat, cholesterol, or sodium permitted in health claims.⁴⁸

Enact a State or Local Menu Labeling Law to Allow Local Enforcement

Under the new federal law, states and localities empowered to do so under state law may pass laws identical to the federal law. States and communities that do so may monitor and enforce the law within their jurisdictions. As a practical matter, states and localities are in a better position than the FDA to monitor and enforce menu-labeling in their communities. Vermont has enacted a menu-labeling law that is identical to the federal law for that purpose.⁴⁹ Similarly, King County, Wash., recently amended its pre-existing menu-labeling law to be identical to the federal law so that it may monitor its local restaurants.⁵⁰

States and localities also may pass menu-labeling laws to address those restaurants not subject to the federal menu-labeling law. But, as noted above, restaurants subject to a state or local law but not to the federal law may opt to comply with either the federal or non-federal law.

Establish Fast Food Zoning Restrictions

Communities also may use their zoning power to regulate the types and density of certain types of restaurants. Local governments have considerable discretion when enacting zoning regulations, including those restricting the location, density, or number of fast food restaurants. For example, Concord, Mass., and Carmel, Calif., ban all fast food restaurants.⁵¹ Recently, the Los Angeles City Council adopted a ban on new freestanding fast food restaurants in the South Central part of Los Angeles.⁵² Detroit prohibits fast food restaurants within 500 feet of schools.⁵³ NPLAN has a model ordinance limiting fast food restaurants near schools. NPLAN's *Model Healthy Food Zone Ordinance: Creating a Healthy Food Zone Around Schools by Regulating the Location of Fast Food Restaurants*, is available at: www.changelabsolutions.org/publications/model-ord-healthy-food-zone.

Governments enact zoning laws under their police power.⁵⁴ Provided there is a reasonable basis for different zoning treatment of similar lands, land uses, or land users, courts will generally uphold the regulations, even in the absence of evidence that the different zoning treatment will have its intended effect.⁵⁵ When drafting zoning restrictions, communities should ensure that they have articulated a rational basis – protecting the health, safety, or general welfare of their citizens – to justify the difference in treatment.

Conclusion

Americans love to dine out and eat on average a third of their meals in restaurants. But deciding to eat a meal out shouldn't mean having to eat an unhealthy meal. Innovative cities are adopting polices to make healthy options more readily available. With a clear understanding of the laws regulating restaurants, communities can be sure to adopt strategies that comport with the law and have a stronger likelihood of success.



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- ¹ Larson N, Story M and Nelson MC. *Restaurant Realities: Inequalities in Access to Healthy Restaurant Choices*. Healthy Eating Research, July 2008. Available at: www.healthyeatingresearch.org/images/stories/her_research_briefs/her%20restaurant%20realities_7-2008.pdf.
- ² Stuart H, Bilsard N, and Jolliffe D. *Let's Eat Out: Americans Weigh Taste, Convenience, and Nutrition*. US Department of Agriculture Economic Research Service, Oct. 2006. Available at: www.ers.usda.gov/publications/eib19/eib19.pdf.
- ³ *New York State Restaurant Assoc. v. New York City Board of Health*, 556 F.3d 114, 118, (2nd Cir. 2009).
- ⁴ 21 U.S.C. § 343(q)(5)(H) (2010). The law also applies to vending machines operated by a person or entity that owns or operates 20 or more vending machines. 21 U.S.C.A. § 343(q)(5)(H)(viii) (2010). Vending machines will require “a sign in close proximity to each article of food or the selection button that includes a clear and conspicuous statement disclosing the number of calories contained in the article [of food],” unless the vending machine allows a prospective purchaser to examine the Nutrition Facts Panel before purchasing the food item or otherwise provides visible nutrition information at the point of purchase.
- ⁵ 21 U.S.C. § 343(q)(5)(H)(i) (2010).
- ⁶ 21 U.S.C. § 343(q)(5)(H)(ii) (2010).
- ⁷ Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 76 Fed. Reg. 66,19192 (April 6, 2011) (to be codified at 21 C.F.R. pts. 11 and 101).
- ⁸ Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Correction. 76 Fed. Reg. 100,30050 (May 24, 2011)(to be codified at 21 C.F.R. pts. 11 and 101).
- ⁹ 21 U.S.C. § 343-1(a)(4) (2010).
- ¹⁰ 21 U.S.C. § 343-1(a)(4) (2010).
- ¹¹ Voluntary Registration by Authorized Officials of Non-Covered Retail Food Establishments and Vending Machine Operators Electing To Be Subject to the Menu and Vending Machine Labeling Requirements Established by the Patient Protection and Affordable Care Act of 2010, 75 Fed. Reg. 43182-04 (July 23, 2010).
- ¹² 21 U.S.C. §§ 332, 333 (2011).
- ¹³ 21 U.S.C. § 337 (2011); 21 C.F.R. §100.2 (2011).
- ¹⁴ 21 U.S.C. § 343(r)(1) (2010).
- ¹⁵ See 21 C.F.R. pts. 100 and 101 (2011).
- ¹⁶ 21 U.S.C. § 343(r)(1)(A) (2010); emphasis added.
- ¹⁷ 21 C.F.R. § 101.13(c) (2011).
- ¹⁸ Guidance for Industry: A Labeling Guide for Restaurants and Other Retail Establishments Selling Away-From-Home Goods. Food and Drug Administration, April 2008, Appendix B. Available at: www.fda.gov/food/guidancecomplianceregulatoryinformation/guidancedocuments/foodlabelingnutrition/ucm053455.htm. (hereafter “FDA Food Labeling Guide”).
- ¹⁹ 21 C.F.R. § 101.10 (2011).
- ²⁰ FDA Food Labeling Guide, question no. 9, *supra* note 18.
- ²¹ *Id.*
- ²² 21 U.S.C. § 343(r)(1)(B) (2010); 21 CFR § 101.14(a)(1).
- ²³ FDA Food Labeling Guide, question no. 40, *supra* note 18.
- ²⁴ FDA Food Labeling Guide, questions no. 40, 41, *supra* note 18.
- ²⁵ 21 C.F.R. § 101.14(b) (2011).
- ²⁶ 21 C.F.R. § 101.14(a)(4) (2011).
- ²⁷ 21 C.F.R. § 101.14(c) (2011).
- ²⁸ Food and Drug Administration. *Real Progress in Food Code Adoptions*. Sept. 30, 2010. Available at: www.fda.gov/Food/FoodSafety/Product-SpecificInformation/InfantFormula/ConsumerInformationAboutInfantFormula/ucm108156.htm.
- ²⁹ Food and Drug Administration Model Food Code, Preface § 3 (2009).
- ³⁰ Food and Drug Administration Model Food Code § 1-103.10 (2009).
- ³¹ See, e.g. California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Safety Code § 109875 *et seq.*
- ³² *In re Farm Raised Salmon Cases*, 42 Cal.4th 1077, 1083 (2009) [holding that the state can enforce labeling rules that are identical to the FDCA].
- ³³ Cal. Health & Safety Code § 111020 (West 2011).
- ³⁴ National Council of State Legislatures. *Enacted Indoor Smoke-free Laws*. Nov. 2010. Available at: www.ncsl.org/default.aspx?tabid=19911.
- ³⁵ Columbia, South Carolina, along with many other cities and states, ban smoking in restaurants. Columbia Code of Ordin. Ch. 8, Div. 5, §§ 8-215 8-221 (2009).
- ³⁶ Cal. Health & Safety Code § 114377 (West 2009); New York City Health Code § 81.08 (2006).
- ³⁷ § 9-3.5 R.O.H. (1997).
- ³⁸ S.F. Envir. Code ch. 16 (2006).
- ³⁹ Santa Clara, Cal. Code of Ordinances, Division A18, Chapter XXII, §§ A18-350-355.
- ⁴⁰ Watsonville, Cal. Municipal Code, Title 14, ch. 29.
- ⁴¹ 21 U.S.C.A. §343-1(a)(4) (1997).
- ⁴² FDA Food Labeling Guide, question no. 39, *supra* note 18.
- ⁴³ FDA Food Labeling Guide, questions no. 50-57, *supra* note 18.
- ⁴⁴ FDA Food Labeling Guide, question no. 52, *supra* note 18.
- ⁴⁵ FDA Food Labeling Guide, question no. 55, *supra* note 18.
- ⁴⁶ FDA Food Labeling Guide, question no. 66, *supra* note 18.
- ⁴⁷ FDA Food Labeling Guide, question no. 7, *supra* note 18.
- ⁴⁸ FDA Food Labeling Guide, question no. 43, *supra* note 18.
- ⁴⁹ 18 V.S.A. § 4086 (West 2011).
- ⁵⁰ King Co., Wash. Board of Health R & R 07-01 (2010).
- ⁵¹ Town of Concord, Mass. Zoning By-laws §4.7.1 (2008); Calistoga, Cal. Municipal Code §17.22.040 (2009).
- ⁵² Los Angeles City Council General Plan Amendment, (File No. 10-1843, Adopted 12/10/2010).
- ⁵³ Detroit, Mich., Municipal Code § 61-12-91 (2008).
- ⁵⁴ Ziegler E, Rathkopf A and Rathkopf D. 1 *Rathkopf’s The Law of Zoning and Planning* § 1:2 (4th ed. 2009).
- ⁵⁵ Ziegler E, Rathkopf A and Rathkopf D. 1 *Rathkopf’s The Law of Zoning and Planning* § 4:1 (4th ed. 2009).

North Carolina has adopted a law based upon the 1976 Model Foodservice Code. The District of Columbia, Puerto Rico, and the Virgin Islands have also adopted versions of the Food Code. Of the 345 federally recognized tribes with food service operations, as of February, 2010, only 63 have adopted a tribal food code, 54 of which are based on the FDA Model Food Code.