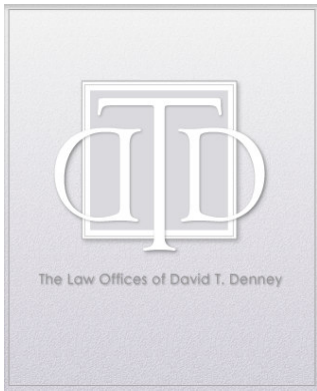


The Modern Menu:
Warnings, Disclaimers and Nutrition Labeling

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I. SCOPE OF ARTICLE

This article will focus on the legal aspects of menu design, including the use of warnings and disclaimers to avoid (or limit) liability for foodborne illness and allergic reactions. The session will also address existing nutrition labeling laws, as well as proposed national menu labeling legislation. Further, the article explores selected cases and suggests policies and procedures that can be implemented to prevent similar claims. While not intended to be a comprehensive snapshot of the current state of proposed or active legislation at a given time, it should provides some insight into the myriad regulations that now (or soon will) govern what we put on our menus.

II. INTRODUCTION

Food and beverage operations, whether in hotels, restaurants or catering venues, are constantly at risk for lawsuits stemming from customers contracting a foodborne illness or suffering an allergic reaction. A basic understanding of the potential theories of liability is useful in evaluating the many cases in this field.

A. LEGAL FOUNDATIONS OF LIABILITY IN FOODSERVICE

Plaintiffs often sue food and beverage operations under a variety of causes of action. Understanding the various theories of liability can provide insight into developing prevention techniques and training foodservice staff on the importance of diligent food handling.

1. Breach of Warranty

Breach of warranty cases are of particular concern not only because they have historically been applied with inconsistency across various jurisdictions, but also because of the possibility that such a breach could trigger liability under (often stringent) state consumer protection statutes. For example, a plaintiff may pursue an action under the Texas Deceptive Trade Practices Act (“DTPA”) for the breach of an express or implied warranty.¹ Further the DTPA provides for not only an award of attorneys’ fees to a successful plaintiff, but will allow a plaintiff to recover treble damages in the event of a “knowing” breach of warranty;² that is, one done with “actual awareness” of the breach (such awareness can be inferred).³

¹ TEX. BUS. & COM. CODE §§ 17.46; 17.50 (a)(2).

² *See Id.* §17.50(b)(1).

³ *See Id.* §17.45(9).

a. Implied Warranty of Fitness for Human Consumption

In the sale of goods context, “merchantable” means that a product is fit for the ordinary purpose(s) for which it is sold.⁴ In the case of food or beverage, that ordinary purpose is human consumption. Thus, any foodservice operation that serves food or drink to a customer is impliedly warranting that the product will be fit to eat or drink. Section 2-314 of the Uniform Commercial Code provides for an implied warranty of merchantability in the sale of goods, and expressly states that the serving of food or drink for value constitutes a “sale.”⁵

Historically, courts have used two tests to determine whether a food product is defective and, consequently a defendant’s liability, if any. The legal theory under which these tests are employed is the Common Law “Implied Warranty of Fitness for Human Consumption,” which applies to food or beverages purchased for consumption on- or off-premises from restaurants, grocery stores, concessionaires, vending machines, etc.

The “Foreign/Natural” test is the older theory, still used in a few states. Not surprisingly, this test draws a distinction between the “foreign” and “natural” characteristics of a food product ingredient. If an object or substance in a food product is natural to any of the ingredients of the product, there is no liability for injuries caused; if the object or substance is foreign to any of the ingredients, the seller or manufacturer of the product may be liable for any injury caused.⁶

The Foreign/Natural test began to fall out of favor in light of cases finding that the test’s focus on the product in its natural form failed to recognize that sellers might fairly be held responsible in some instances for natural substances in food that caused injury.

Conversely, the “Reasonable Expectation” test examines what is reasonably expected by the consumer in the food product as served, not what might be foreign or natural to the ingredients of that product before preparation. The majority of jurisdictions dealing with the defective food products issue have adopted some formulation of the Reasonable Expectation test. As applied to common-law negligence, the Reasonable Expectation test is related to the foreseeability of harm on the part of the defendant; that is, the defendant has the duty of ordinary care to eliminate or remove in the preparation of the

⁴ See UNIFORM COMMERCIAL CODE, Article 2 – SALES, §2-314 (2), available online at <http://www.law.cornell.edu/ucc/2/article2.htm> (last visited Dec. 1, 2009).

⁵ See *Id.* §2-314(1).

⁶ See *Jackson v. Nestle-Beich, Inc.*, 589 N.E.2d 547, 548 (Ill. 1992); see also *Mix v. Ingersoll Candy Co.*, 59 P.2d 144, 148 (Cal. 1936) (holding the defendants not liable for a restaurant patron's damages from injuries resulting from alleged negligence and alleged breach of implied warranty because a bone in the chicken pie was a natural substance) (overruled by *Mexicali Rose v. Superior Court*, 822 P.2d 1292 (Cal. 1992)); *Webster v. Blue Ship Tea Room, Inc.*, 198 N.E.2d 309, 312 (Mass. 1964) (holding the defendant restaurant not liable for alleged breach of implied warranty of merchantability because a fish bone was a natural ingredient in a bowl of New England fish chowder served).

food served such harmful substance as the consumer of the food, as served, would not ordinarily anticipate and guard against.⁷ Under the approach adopted by the Restatement (Third) of Torts: Products Liability, a consumer's expectation is based on culturally defined, widely shared standards allowing a seller's liability to be resolved by judges and juries based on their (subjective) assessment of what consumers have a right to expect from preparation of the food in question.⁸ Notably, the Reporters to the Restatement state that the majority view is unanimously favored by law review commentators.⁹

Numerous cases have, for what it's worth, juxtaposed the two tests.¹⁰

b. Express Warranty

An express warranty is “any affirmation of fact or promise made by the seller which relates to the goods and becomes part of the basis of the bargain.”¹¹ Issues with express warranties arise when purveyors make overt statements about a product. Examples of might occur in writing (i.e. on a menu), and might look like: “Wild Salmon” or “No Sulfites,” or they can occur orally, such as: “We can serve you a meal without nuts.”

2. Strict Liability in Tort

In addition to other possible causes of action, plaintiffs in foodborne illness cases will often seek recovery under a “Strict Liability” theory, alleging that a product was so dangerous as to require a warning to consumers.¹² Though this cause of action is really just another way of pleading the Implied Warranty of Fitness for Human Consumption,¹³ but Plaintiffs routinely plead both in strict liability and for breach of warranty (probably to ensure bootstrapping into the consumer protection statutes). Historically, courts have not found that the UCC warranty claims preclude parallel causes of action in strict liability.¹⁴ Finally, plaintiffs will also plead negligence, but neither the strict liability nor breach of warranty causes of action require a showing of negligence to recover damages.

⁷ See Restatement (Third) of Torts: Products Liability § 7 rep. n.1 to cmt. b (1998).

⁸ *Id.* cmt. b.

⁹ *Id.* rep. n.1 to cmt. b.

¹⁰ See *Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570 (Minn. 2005); *Porteous v. St. Ann's Cafe & Deli*, 713 So. 2d 454 (La. 1998).

¹¹ See UNIFORM COMMERCIAL CODE, Article 2 – SALES, §2-313 (2).

¹² *Clime v. Dewey Beach Enter.*, 831 F. Supp. 341 (D. Delaware 1993).

¹³ See *Evans v. MIPTT, LLC*, 2007 Tex.App. LEXIS 4680, *1 (Tex.App.—Houston [1st Dist.] 2007) (plaintiff “claimed that the restaurant was (1) negligent, and (2) strictly liable as a preparer or server of food, for providing defective food that was unsafe for its intended purpose, consumption.”).

¹⁴ See *Wachtel v. Rosol*, 159 Conn. 496 (1970).

Enough raw shellfish cases have been decided under a strict liability theory that by now foodservice operators should know to put a disclaimer on menus. Raw shellfish contains bacteria that can cause infection, illness and even death in people with compromised immune systems or certain liver, stomach or blood disorders.¹⁵ Without a disclaimer, courts have found the delicious but bacteria-laden foods inherently and unreasonably dangerous.¹⁶

3. Statutory Liability

“Truth in Menu” is industry jargon for the loose body of laws that requires restaurants to accurately serve what is described on their menus. The concept itself, however, goes far beyond giving the customer what she thinks she should be getting, touching on issues of false advertising, consumer protection and breach of warranty.¹⁷ Truth in Menu laws mandate that restaurants serve what they advertise. Whitefish cannot be served as grouper. Product origin, if described, must be correct (“Roquefort” cheese should be from Roquefort, France; “Maine Lobster” should be from Maine). Ingredients and cooking methods, if described, must also be followed.¹⁸

Many states impose statutory liability for violations of Truth in Menu statutes. Florida’s Department of Business and Professional Regulation, for example, enforces the state’s law against misrepresenting food, which carries a fine of up to \$1,000.00 per violation.¹⁹

These misrepresentations can also pave the way to liability under state consumer protection statutes for false advertising, breach of warranty or deceptive trade practices, which often carry treble damages for “knowing” violations.²⁰

¹⁵ See, e.g., *Edwards v. Hop Sin, Inc.*, 140 S.W.3d 13 (Ky. Ct. App. 2003) (genuine issue of material fact precluded summary judgment for restaurant where customer contracted illness after consuming raw oysters and distributor had included warning on hazards of eating raw oysters and instructed retailer to inform customers of those hazards, because jury could find retailer altered the product by failing to convey warning to its customer).

¹⁶ See *Edwards*, 140 S.W.3d at 17.

¹⁷ David T. Denney, “What You Say is What They Get: A Truth-in-Menu and Menu Labeling Laws Primer,” in *Restaurant Startup & Growth*, October 2009, p. 25.

¹⁸ *Id.*

¹⁹ See “DBPR Doubles Fine for Food Violations,” May 29, 2007, available online at <http://www.myfloridalicense.com/dbpr/os/News/FineForFoodViolations.html> (last visited Dec. 10, 2009); see also Jackie Sayet, “Florida Restaurants Admit to Serving Kobe Beef That Isn’t Kobe,” in *New Times: Broward-Palm Beach*, available online at: http://blogs.browardpalmbeach.com/cleanplatecharlie/2009/10/fake_kobe_beef.php (last visited Dec. 10, 2009).

²⁰ See *supra*, Note 1.

Another consideration is how and when an operator measures the weight or volume of its products. When an operator orders meat sealed at a USDA-regulated meat-packing plant, the contract between the distributor and the restaurant company will normally contain some sort of net weight allowance. This is necessary due to the “weep” or “purge” of natural juices meat experiences after being processed. Though a steak weighing exactly ten ounces leaves the processor, the operator might receive something akin to a steak weighing nine ounces accompanied by once ounce of purged juices. A contractual provision governing allowable +/- weights net of purge allows the parties to reasonably contract for the meat the restaurant wants to serve.²¹

The restaurant must, however, serve the steak it advertises. If it takes delivery of a steak weighing nine ounces after purge, but advertises that steak as “ten ounces” or even as “ten ounces, pre-cooked weight,” it could be in violation of Truth in Menu laws.²²

Enforcement of Truth in Menu laws are relegated to various agencies, and operators should consult their local Board of Health, state Department of Consumer Affairs or an attorney familiar with food and beverage law with specific questions regarding local regulations.

III. MENU LABELING LEGISLATION

A. NUTRITION LABELING AND EDUCATION ACT (“NLEA”)

At the Federal level, the Nutrition Labeling and Education Act of 1990 (“NLEA”) and the rules issued by the U.S. Food and Drug Administration (“FDA”) govern nutrition and health claims made by restaurants. “Nutrient Content Claims” are direct or implied statements about the level of a substance in a food (e.g. “low sodium,” “low fat” or “contains 100 calories”). For example, a claim that a food is “low fat” may only be made if the item contains less than three grams of fat per standard serving. “Health Claims” are direct or implied statements that characterize the relationship of the food or an ingredient to a disease or health-related condition (e.g. a “heart” symbol or “heart healthy” designation).²³

Once a restaurant makes a claim on its menu it must make nutritional information available to customers upon request. This information may be provided via a brochure, an insert, or orally by a restaurant employee. The restaurant must make a “reasonable basis determination” that the nutrition information it provides to the consumer is correct, and the FDA will look at the recipe, the source of the nutrition information, and the restaurant’s ingredient calculations as the basis for that determination. The FDA will then

²¹ See *supra*, Note 17, p. 26.

²² See *id.*

²³ See *id.*, p. 27.

evaluate whether the basis information and the information provided to customers is consistent with the FDA's definition for the claim used.²⁴

Under FDA rules, a restaurant is required to keep records sufficient to allow regulatory officials to review on its "reasonable basis" and determine that preparation methods adhere to that basis.²⁵

The FDA provides the following checklist for the information a restaurant should retain, including:²⁶

1. A standardized recipe, including the ingredients used and their quantities;
2. Nutrient content data for each ingredient (may include information from the ingredient manufacturer, a reliable data base, or other nutrient information source, or a combination of these; information must include data for the nutrients that are the basis for the claim and may include data for other nutrients);
3. The source of the above data (e.g., the name of the data base, cookbook, etc.);
4. Any assumptions made by the restaurateur or any calculations that were performed that may affect the reliability of the data (e.g., combining data sources, assumed nutrient values, replacing generic or average data base values with values for brands specifically used in the restaurant, etc.);
5. Serving size (total weight) of the finished food or meal;
6. Total amount of nutrient present per RACC ("Reference Amount Customarily Consumed"), actual serving, or per 100 g of food, as appropriate for the definition of the claim;
7. Evidence of staff awareness that reasonably consistent ingredient measurement and portion control are necessary for foods bearing a claim (e.g., training materials, observation of food preparation methods); and
8. Presence and use of a standard operating procedure identifying essential parameters in the preparation of a food bearing a claim (e.g., the use of skim milk instead of whole milk, broiling instead of frying, or the need

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See id.*, p. 28.

to measure salt instead of salting to taste), when the method of preparation could affect the basis for a claim.

Even with the seeming inevitability of new Federal menu labeling legislation, It is important to understand these existing regulations since (a) restaurants are still governed by them, (b) restaurants will likely continue using descriptors such as “heart healthy,” even after they are required to post caloric or even more complete nutritional information on their menus by new legislation, and (c) not all restaurants will be subject to the new legislation.²⁷

B. MENU EDUCATION AND LABELING ACT (“MEAL Act”)

The MEAL Act²⁸ is a measure that has been introduced several times in the past few years without passage, but since its sponsors have promised to again introduce the measure in the current legislative session, it must be addressed as a viable candidate for legislative action. The measure, which would amend the NLEA, is supported in large part by the Center for Science in the Public Interest, a consumer advocacy group.²⁹

The MEAL Act would apply to restaurant chains with twenty or more units doing business under the same trade name, and would require those restaurants to disclose the following information adjacent to each item on their menus: calories, grams of saturated and trans fat, and milligrams of sodium. Menu boards would only be required to convey calorie information, but with a notification that the other nutrition information (fat, sodium and recommended daily allowances) will be made available in writing upon request. The bill would exempt condiments, general use items and daily specials, but would require the restaurant to post the number of calories per standard serving for each self-serve food item on a buffet or salad bar. Finally, the bill would even require vending machines to display the calories in each item.³⁰

A very important and hotly-debated feature of the MEAL Act that distinguishes it from other proposed legislation is that it would give states and municipalities the right to adopt even more stringent requirements. This would leave open the possibility that restaurants would be required to make additional nutrition disclosures that differ in each locality. The National Restaurant Association has taken a stance against the MEAL Act

²⁷ *See id.*, p. 27.

²⁸ H.R. 2426 (2009) available online at: <http://www.govtrack.us/congress/billtext.xpd?bill=h111-2426> and S. 1048 (2009), available online at: <http://www.govtrack.us/congress/billtext.xpd?bill=s111-1048>.

²⁹ *See supra*, Note 17, p. 28.

³⁰ *See id.*

for this reason, arguing that the absence of preemption would inevitably result in a hodgepodge of differing regulations across various cities and states.³¹

C. LABELING EDUCATION AND NUTRITION ACT (“LEAN Act”)

The LEAN Act³² is supported by the Coalition for Responsible Nutrition Information, whose members include the U.S. Chamber of Commerce, the National Restaurant Association and various state restaurant and hospitality associations. Like the MEAL Act, it would apply to chains with twenty or more units doing business under the same trade name.³³

In contrast to the MEAL Act, though, the LEAN Act would require that calorie information be posted (or included in the menu or an insert) for all menu items featured more than ninety days per year, while also requiring that the menu inform diners that other nutrition information (total fat, saturated fat, cholesterol, sodium, carbohydrates, sugars, dietary fiber, protein) is available in writing, upon request. The LEAN Act does not address nutrition labeling for salad bars, buffets or vending machines.³⁴

Arguably the most important feature of the LEAN Act is that it would preempt states and municipalities from enacting menu labeling laws inconsistent with its language. This would eliminate the costly prospect of restaurants providing different nutrition information in different cities, counties and/or states.³⁵

Finally, the LEAN Act includes “safe harbor” protection from frivolous lawsuits for restaurants that make disclose nutrition information but do not purposefully fail to disclose the required information or make a false disclosure with the intent to deceive.³⁶

D. STATE AND LOCAL MENU LABELING LAWS

Seventeen states saw various versions of menu labeling legislation introduced in 2009 alone (Oregon, Texas, Oklahoma, Missouri, Indiana, Kentucky, Tennessee, Florida, West Virginia, Maryland, New York, Vermont, Maine, Massachusetts, Rhode Island, Connecticut and Hawaii). None of these measures are exactly the same, however, and

³¹ See “News Release: National Restaurant Association Applauds LEAN Act Introduction in U.S. House and Senate,” available online at: <http://www.restaurant.org/pressroom/pressrelease.cfm?ID=1756> (last visited Dec. 12, 2009).

³² H.R. 1938 (2009) available online at: <http://www.govtrack.us/congress/billtext.xpd?bill=h111-1398> and S. 558 (2009), available online at: <http://www.govtrack.us/congress/billtext.xpd?bill=s111-558>.

³³ See *supra*, Note 17, p. 28-29.

³⁴ See *id.*

³⁵ See *id.*

³⁶ See *id.*, p. 28.

some differ greatly. Proposed menu labeling legislation introduced in Florida, for example, would impact all restaurants with five or more units in the state, whereas legislation proposed in Texas would affect only restaurant chains with twenty or more units located in the state.³⁷ See **Appendices 1 and 2** for charts comparing various city and state menu labeling regulations.

IV. SELECTED MENU WARNING/DISCLAIMER CASES

A. *Edwards v. Hop Sin, Inc.*³⁸

1. Pertinent Facts

Plaintiff ate raw oysters from the Defendant's oyster bar and became ill the next day. *Vibrio vulnificus* bacteria in the oysters worsened the Plaintiff's liver condition. While the *vibrio* bacterium has no effect on the majority of the population, it can cause death or serious injury in those with weakened or impaired immune systems. The restaurant did not post a warning, nor did its menu contain a warning about the danger of eating raw oysters.

The container in which the oysters arrived at the restaurant bore the following warning:

There is a risk associated with consuming raw oysters or any raw animal protein. If you have chronic illness of the liver, stomach, blood or have immune disorders, you are at greater risk of serious illness from raw oysters. You may, however, eat your oysters fully cooked. If unsure of your risk you should consult your physician. Please share this information with your customers.³⁹

2. Analysis

The appellate court reversed the trial court's summary judgment for the defendant restaurant, because jury could find either (a) the restaurant "altered the product" by failing to convey warning to its customer, or (b) "the restaurant knew or should have known that absent a warning the oysters . . . posed an unreasonable risk of harm to some persons."⁴⁰

³⁷ See *id.*, p. 27.

³⁸ (140 S.W.3d 13 (Ky. Ct. App. 2003)).

³⁹ *Id.* at 17.

⁴⁰ *Id.*

B. *Woeste vs. Washington Platform Saloon & Restaurant* ⁴¹

1. Pertinent Facts

The Plaintiff's husband died as a result of contracting the bacteria *vibrio vulnificus* after consuming raw oysters at the Defendant restaurant, Washington Platform. Plaintiff's husband suffered from Hepatitis C and cirrhosis of the liver, making him particularly susceptible to *vibrio*. He died one week after contracting *vibrio* from the raw oysters.⁴²

The restaurant's menu contained the following warning:

Consumer Information: There may be risks associated when consuming shell fish as in the case with other raw protein products. If you suffer from chronic illness of the liver, stomach or blood, or if you are pregnant or if you have other immune disorders, you should eat these products fully cooked.⁴³

The Plaintiff's husband, however, ordered his oysters without opening or reading the menu (and, thus, the warning).⁴⁴

Plaintiff alleged that Washington Platform was negligent and strictly liable for failing to adequately warn of the dangers of eating raw oysters, and that the restaurant violated Ohio's Pure Food and Drug Law by receiving and delivering adulterated oysters.⁴⁵

She further alleged that the seafood harvesting company, Johnny's, was negligent for breaching a duty not to abuse the temperature of harvested oysters, was strictly liable for failing to warn of the dangers associated with the oysters, and that Johnny's violated Ohio's Pure Food and Drug Law by receiving or distributing adulterated oysters.⁴⁶

2. Analysis

The Court held that Washington Platform's warning, present in its menu, adequately put a patron on notice of the risk associated with eating raw shellfish. The restaurant could not be subjected to liability for the deceased's failure to read the warning

⁴¹ 836 N.E.2d 52 (Oh. App. 2005).

⁴² *Id.* at 55.

⁴³ *Id.* at 56.

⁴⁴ *Id.* at 55.

⁴⁵ *Id.* at 57.

⁴⁶ *Id.* at 58.

provided in the menu. The Court held it was unreasonable and impractical to require the restaurant to post warnings in other, more visible locations throughout the restaurant. Placing the warning next to the menu item in question was sufficient.⁴⁷

The Court further held that neither the restaurant, nor the supplier violated Ohio's PURE FOOD AND DRUG LAW because the oysters were not adulterated, *since the vibrio bacteria is naturally taken in by oysters when they feed*, and is therefore naturally occurring.⁴⁸

The Court found no evidence in the record to support a claim that Johnny's abused the temperature of harvested oysters. It also found that the warning placed by Johnny's on each sack of oysters was adequate and sufficient.

C. *Livingston v. Marie Callender's, Inc.*⁴⁹

1. Pertinent Facts

A diner asked his server whether the soup contained MSG, another common allergen. She assured him that it did not, and the restaurant advertised its soup as "made from the freshest ingredients, from scratch, . . . every day."⁵⁰

After consuming the soup, he suffered MSG Symptom Complex, which caused his lungs to shut down and sent him into cardiac arrest, resulting in brain damage due to lack of oxygen.

2. Analysis

The appellate court reviewed the case under the application of strict liability principles – that is, whether the soup contained "an ingredient to which a substantial number of the population are allergic;" or an ingredient "which the customer would reasonably not expect to find in the product."⁵¹

The Plaintiff did not contend that the restaurant had a duty to warn about possible adverse reactions to MSG, instead contending it had an obligation to warn customers that MSG was present in the soup.⁵²

⁴⁷ *Id.* at 57.

⁴⁸ *Id.*

⁴⁹ (1999) 72 Cal. App. 4th 830 [85 Cal. Rptr. 2d 528].

⁵⁰ *Id.* at 832.

⁵¹ *Id.* at 839.

⁵² *Id.* at 840, n.4.

The court of appeals upheld a trial court finding that the restaurant was not negligent, but remanded for a determination by the trier-of-fact the “failure to warn” cause of action. Of particular import, the court of appeals reversed the trial court’s dismissal of the Marie Callender’s corporate entities.⁵³

V. DEVELOPING POLICIES AND PROCEDURES TO AVOID LIABILITY

A. MENUS, GENERALLY

The following practices will allow restaurateurs to be flexible in the look and utility of their menus:

- 1. Never laminate a menu.** Re-laminating costs will soon outpace the one-time cost of jackets or sleeves. Worn-out lamination looks terrible, and managers are often hesitant to incur the cost of replacing tired menus until long after they are past their prime. Most importantly, using a paper menu will allow you to make changes at a moment’s notice.
- 2. Font.** Pick a legible font/size for your menu and choose the size for the disclaimer accordingly. If your disclaimer is too large, it will be off-putting to guests, but if it is too small you will run the risk of it being ineffective. For counter-service restaurants, consider placing disclaimers on the counter, at the point of sale.

B. FOODBORNE ILLNESS DISCLAIMERS

Many states have enacted a statutory duty to warn diners of the risk(s) associated with consuming raw oysters or any raw animal protein.⁵⁴ In fact, in the time between the incident complained of in *Woeste* and the appellate decision in that case, Ohio enacted a duty to warn law.

Even in states with no statutory duty to warn, however, menu disclaimers such as the one that saved the restaurant in this case are well worth the cost of printing. Some examples include (in varying degrees of specificity):

- 1. La Cucina Dolce, Monroeville, PA:** “Disclaimer: Consuming raw or undercooked meat, fish or dairy can pose a health risk for certain individuals.”⁵⁵

⁵³ *Id.* at 841.

⁵⁴ *Woeste vs. Washington Platform Saloon & Restaurant* 836 N.E.2d 52, 56-7 (Oh. App. 2005) (discussing “duty to warn” laws in Louisiana, Texas and Ohio).

⁵⁵ Available online at: <http://www.lacucinadolce.com/dinner.htm> (last visited Dec. 1, 2009).

2. “There is a risk associated with consuming raw oysters or any animal protein. If you have chronic illness of the liver, stomach or blood, or have immune disorders, you are at greatest risk of illness from raw oysters and should eat oysters fully cooked. If unsure of your risk, consult your physician.”⁵⁶
3. The Drum Room (Kansas City, MO) menu features two great disclaimers:⁵⁷

“Legal Disclaimer

According to the Kansas City Mo. Health department consuming raw or undercooked foods may be hazardous to your health.

Chef’s disclaimer

Consuming overcooked meats, seafood or eggs may decrease your dining pleasure; if you order your food well done we will do our best to meet your expectations.”

4. Many university foodservice operations use the following disclaimer, almost verbatim:⁵⁸

“Dining Services makes every attempt to identify ingredients that may cause allergic reactions for those with food allergies. Every effort is made to instruct our food production staff on the severity of food allergies. In addition, we label items with possible allergen-containing ingredients; however, there is always a risk of contamination. There is also a possibility that manufacturers of the commercial foods we use could change the formulation at any time, without notice. Customers concerned with food allergies need to be aware of this risk. Clark Dining Services will not assume any liability for adverse reactions to food consumed, or items one may come in contact with while eating at any Dining Service establishment. Students with food allergies are encouraged to contact Dining Services for additional information and/or support.”

⁵⁶ Required by TEX. ADMIN. CODE 229.164 .

⁵⁷ Available online at:

<http://docs.google.com/gview?a=v&q=cache:1tHGfVocMVQJ:www.kcrestaurantguide.com/drumroommenu.pdf+restaurant+disclaimer+consuming+raw&hl=en&gl=us&pid=bl&srcid=ADGEESgkT6PBadQHRdq8El n7SbVG87 A- m5TjA95ucv3mK9-N-IJFV0WxAkB5sF0m2-1ov5jO3tx112TEbWPs22XpJHJ6 QiT-yPyeAHCzBwOhmsiLhSVNfwinRNYboscfvS IRSOWWa&sig=AFQjCNEHEA1Y-V79OBSg-aJ6a4IKh2s8YA> (last visited Dec. 1, 2009).

⁵⁸ Available online at: <http://www.clarkdining.com/documents/Food%20AllergyDisclaimer08.22.08.pdf> (last visited Dec. 1, 2009); see also <https://www.uwsp.edu/centers/dining/locations/debot.asp> (last visited Dec. 1, 2009).

C. ALLERGEN DISCLAIMERS

A food allergy is an abnormal response to a food triggered by the immune system. Though many people often have gas, bloating or another unpleasant reaction to something they eat, this is not an allergic response. Such a reaction is thought to not involve the immune system and is called "food intolerance." Only about 1.5 percent of adults, and up to 6 percent of children younger than 3 years in the United States (about 4 million people), have a true food allergy.⁵⁹

Food allergy patterns in adults differ somewhat from those in children. The most common foods to cause allergies in adults are shrimp, lobster, crab, and other shellfish; peanuts; walnuts and other tree nuts; fish; and eggs. In children, eggs, milk, peanuts, soy and wheat are the main culprits. Children typically outgrow their allergies to milk, egg, soy and wheat, while allergies to peanuts, tree nuts, fish and shrimp usually are not outgrown.⁶⁰

The Food Allergy and Anaphylaxis Network ("FAAN") has assembled a program entitled, "Welcoming Guests with Food Allergies" to provide tools for restaurant staff in serving these guests. FAAN recommends that restaurants include a notice, similar to the ones below, on their menus.⁶¹

1. "Food-allergic guests, please see manager"
2. "For those who have food allergies, please inform your server. We will be happy to discuss any necessary changes."

Most restaurants, however, will want to take the allergy disclaimer further, and reference the possibility of cross-contamination.⁶²

"Information regarding allergens is provided by the ingredient manufacturer. Famous Dave's of America and its employees do not assume responsibility for this information or a particular sensitivity or allergy to any food item provided in the restaurant. ***Please be aware that cross contamination may occur between ingredients. Based on our product mix and preparation, we cannot guarantee that any menu item is completely free of any allergen.***

⁵⁹ Ray Formanek Jr., "Food Allergies: When Food Becomes the Enemy," in *FDA Consumer Magazine*, available online at http://findarticles.com/p/articles/mi_m1370/is_4_35/ai_76551022/ (last visited Nov. 23, 2009).

⁶⁰ *Id.*

⁶¹ FOOD ALLERGY AND ANAPHYLAXIS NETWORK, "Welcoming Guests with Food Allergies." Available online at: <http://foodallergy.org/page/restaurants-guests-with-food-allergies> (last visited Dec. 1, 2009).

⁶² Available online at: <http://www.famousdaves.com/menu/ingredient-information> (last visited Dec. 1, 2009) (emphasis added).

We strive to do our very best in providing you with accurate information that will help you make the best food choices for yourself. Please inform your restaurant manager if you have a food allergy and ask to see the ingredient listings for the menu items you are interested in choosing, or review them regularly on this web site.”

VI. CONCLUSION

Preventing statutory liability, as well as civil liability for foodborne illness and allergy claims, starts – and ends – with the operator. Your menu can be a tool in liability protection, if used properly. Without hands-on efforts to develop policies and procedures to reduce risk, however, an understanding of the foundations of such liability will really only provide the savvy defendant with an ability to anticipate the direction of the plaintiff’s punches before they land.

Finally, legislative initiatives stand to reshape the landscape of the restaurant business as it currently exists. Familiarize yourself with pertinent local menu labeling regulations, as well as the important points of the federal legislation, and you will be ready when the time comes to make changes.

APPENDIX 1



COMPONENTS OF STATE MENU LABELING LEGISLATION AND PROPOSED REGULATIONS FILED IN 2009

	BILL #	Sponsor	Calories ¹	Drive-thrus ²	Tags ³	Font ⁴	Statement ⁵	Preemption ⁶	Date ⁷	Number stores ⁸	Standard menu ⁹	Flavors ¹⁰	Combos ¹¹	Servings ¹²	Add'l info ¹³
Fed	LEAN	Matheson Carper Murkowski	B	--	--	✓	**	n/a	Upon enactment; 1 year: proposed regs; 2 years: final regs	20	90	--	--	--	✓
CT	SB 1080	Public Health	A	--	✓	✓	--	--	7/1/10	10	30	✓	--		--
HI	HB 1526	Mizuno	B	AR	✓	--	--	--	On passage	10	30	--	--	--	✓
HI	HB 5	Takai	A	✓	✓	✓	--	--	7/1/09	15	--	✓	✓	--	--
FL	HB 1383 SB 2332	Peaden	B	--	--	✓	--	✓By Fed	✓ (applies to every restaurant in state by 1/1/11)	5 in state only	30	--	--		✓
FL	SB 2590	Siplin	B A after 7/1/10	AR	✓ after 7/1/10	✓	--(broch-ure only)	✓	B: 7/1/09 A: by 7/1/10	20	180	--	✓ after 7/1/10	✓ after 7/1/10	
IL	HB 28	Flowers	C	--	--	--	--	--	--	--	--	--	--	--	--
IN	HB 1207	Brown	B	--	--	✓	--	--	7/1/09	10 in state	--	--	✓	--	✓
KY	SB 133	Angel	A	✓	✓	✓	--	--	--	10 in state	--	--	--	--	✓

ME	HB 149	Pingree	A	✓	✓	✓	✓	--	05/01/10	15	30	✓	--	--	--
	#	Sponsor	Calories	Drive-thrus	Tags	Font	Statement	Preemption	Date	Number stores	Standard menu	Flavors	Combos	Servings	Add'l info
MA	105 CMR 590 Department of Public Health	Auerbach, Commissioner	A	✓	✓	✓	--	--	6 months from final promulgation	15	30	✓	✓	✓	--
MD	HB 601; SB 142	Niemann Harrington	A	--	✓	✓	✓	--	10/1/10	15	30	✓	✓	✓	✓
MO	HB 755	Grill	A	✓	✓	✓	--	--	--	15	30	✓	✓	--	--
NY	HB 2720	Ortiz	A	--	--	✓	--	Explicitly allows stronger local laws	✓	5 in state 15 in US	30	✓	✓	--	--
NY	SB 200	Kruger	C	--	--	--	--	--	1/1/10 or 11	*	--	--	--	--	✓
OK	SB 1135	Bass	AB	AR	exempt	✓	on brochure	✓ (local and by Fed)	B: 7/1/10 A: 1/1/12	10	180	--	✓	✓	✓
OR	HB 2762	Kotek	A	--	✓	✓	✓	--	On passage	10	30	✓	✓	--	✓
PA	HB 906	Bishop	A	AR	--	✓	--	--	✓	20	--	--	--	--	--
RI	HB 5520; SB 534	McNamara Sosnowski	A	✓	--	✓	--	By Fed	1/1/10	15	30	--	--	--	--
TN	HB 2319	Kyle	B	✓	✓	✓	--	By Fed	1/1/10	20	90	✓	✓	--	✓
TX	HB 1522	Alvarado	AB after 1/1/2011	AR	✓	✓	✓ on B only	--	B: 1/1/10 A: 1/1/2011	20 in state	180	✓	✓	✓	✓
TX	HB 1845	Lucio	B	--	exempt	✓	--	--	1/1/10	20	90	--	--	--	✓
UT	SB 213	Stephenson	Neither a municipality nor a county may require menu labeling												
VT	HB 120	Koch	A	--	✓	✓	✓	--	Within 12 months of passage	10	30	✓	--	--	✓
WV	HB 2745 SB 419	Perdue Foster	D	TBD	TBD	✓	TBD	TBD	TBD	15 in state	30	TBD	TBD	TBD	TBD

Synopsis:

- 18 states have filed menu labeling bills (not counting Utah, whose bill would forbid menu labeling in counties or municipalities)
- 11 would require at a minimum that calories **must** be posted on the menu and menu board

Of the 11:

- 5 require calories be posted on drive-thru menu boards; 5 don't mention drive-thrus, and one requires a sign at the drive-thru indicating nutrition information is available on request.
 - 8 require calories be posted on tags for salad bars, buffets, and display cases; 3 don't mention them
 - 3 require a statement indicating the average adult eats 2,000 calories per day
- 2 states would require calories be posted on menus and boards after a certain date

EXPLANATION OF CATEGORIES:

¹ **Calories:** A=at a minimum, calories **must** be posted on the menu and menu board; B=calories may be posted in any of several ways, including on the menu or menu board; AB=after a specified date, calories must be posted on menus and menu boards; C=a sign no smaller than 5"x8" must be posted alerting customers to the availability of nutrition information upon request; D=establishes program which will propose rules for legislative approval.

² **Drive-thrus:** ✓= drive-thrus menu boards are explicitly included and calories **must** be listed on the drive-thru menu board; NL=no specific mention of menu boards; AR=sign must say nutrition information is available on request; exempt=language specifically exempts drive-thru menu boards

³ **Tags:** Calories must be listed on tags for salad bars, buffets and display cases. ✓=yes; --=not mentioned; No=specifically exempts salad bars, buffets, and display cases

⁴ **Font:** Language includes at a minimum that nutrition information must be written in a "clear and conspicuous" manner; may also mandate that it be in a font similar in size to prices and names of items

⁵ **Statement:** which indicates that 2,000 calories is average limit for adults, must be posted on menus and menu boards; **must have statement on daily calorie intake ONLY if calories are not listed directly on menus or menu boards

⁶ **Preemption:** Language included that preempts localities and counties from mandating stronger language; "By Fed" indicates language that provisions of bill are superseded if federal law is enacted

⁷ **Date:** date act takes effect

⁸ **Number stores:** indicates minimum number of establishments in and out of state (unless noted only in-state) that qualifies for definition of chain; *=derives 30% or more of its business from sale of prepared, ready to eat food, served in container or wrapper and consumed on premises.

⁹ **Standard menu:** indicates fewest number of days an item must be on menu in order to qualify as a standard menu item for which calories must be posted

¹⁰ **Flavors:** Must display calorie content for different flavors and varieties

¹¹ **Combos:** Must display range of calories for combinations (or one if only one is possible)

¹² **Servings:** Menu items intended to serve more than one person must be indicated, and calories per serving posted.

¹³ **Add'l Info:** Indicates that additional nutrition information may or must be located on premises in writing, and made available to consumers

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APPENDIX 2

Menu Labeling Laws: A Comparative Analysis

Menu labeling is one of many strategies communities are using to improve public health. Studies show that consumers often incorrectly estimate the number of calories in fast food menu items, eating and drinking more than they intend as a result.¹ Although it is considered a broader public health intervention, menu labeling is also an important tool to combat childhood obesity because it provides parents with information to help them make healthy nutritional choices for their children.

The National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN) has developed a model menu labeling ordinance based on model legislation from the Center for Science in the Public Interest, 11 existing local and state laws, and independent research.

NPLAN's model provides a variety of policy options; a community's choice will depend on its goals and local political environment. While the strongest options tend to be better for the health of the community, we recognize that these options may not always be politically feasible.² To ensure an effective public health intervention, NPLAN encourages communities to require, at a minimum, calories on menus, menu boards, and food tags, along with a statement of total recommended daily calorie intake.³

The following table identifies the major provisions of NPLAN's model ordinance and 11 state and local laws, illustrating the various forms menu labeling laws can take.

	NPLAN Model Ordinance	New York City ⁵	King County, Washington ⁶	Multnomah County, Oregon ⁷	Westchester County, New York ⁸	Ulster County, New York ¹⁴	Philadelphia ¹¹	Davidson County, Tennessee ¹²	Massachusetts ¹³	California ^{9,10}	Oregon ¹⁵	Maine ¹⁶
Effective Date	Not applicable	March 31, 2008	August 1, 2008	March 12, 2009	May 12, 2009	October 5, 2009	January 1, 2010	March 10, 2010	November 1, 2010	<ul style="list-style-type: none"> • Preemption in Effect: January 1, 2009 • Partially in Effect: July 1, 2009 • Fully in Effect: January 1, 2011 	January 1, 2011	February 1, 2011
Restaurants Included	Chains with 10 or more restaurants in the United States	Chains with 15 or more restaurants in the United States	<ul style="list-style-type: none"> • Chains with 15 or more restaurants in the United States and collectively \$1 million or more in gross annual sales • Chains must sell standard menu items that comprise at least 80% of menu items in at least 15 restaurants 	<ul style="list-style-type: none"> • Chains with 15 or more restaurants in the United States • Chains must sell standard menu items that comprise at least 80% of menu items in at least 15 restaurants 	Chains with 15 or more restaurants in the United States	Chains with 15 or more restaurants in the United States.	Chains with 15 or more restaurants in the United States	<ul style="list-style-type: none"> • Chains with 15 or more restaurants in the United States • Chains must sell standard menu items that comprise at least 60% of menu items in at least 15 restaurants 	Chains with 20 or more restaurants in Massachusetts	Chains with 19 or more restaurants in California	Chains with 15 or more restaurants in the United States and sell standard menu items that constitute at least 80% of the items served in the restaurants	Chains with 20 or more locations, at least one of which is located in Maine

	NPLAN Model Ordinance	New York City ⁵	King County, Washington ⁶	Multnomah County, Oregon ⁷	Westchester County, New York ⁸	Ulster County, New York ¹⁴	Philadelphia ¹¹	Davidson County, Tennessee ¹²	Massachusetts ¹³	California ^{9,10}	Oregon ¹⁵	Maine ¹⁶
Restaurants Explicitly Excluded	None specified	None specified	<ul style="list-style-type: none"> • Grocery stores • Convenience stores • Movie theaters • Chains located within exempt establishments must comply with the law 	<ul style="list-style-type: none"> • Food facilities that are not full-service facilities licensed by the Multnomah County Health Department (e.g., public and private school cafeterias, government-operated food facilities) • Movie theaters • Hospital cafeterias • Temporary events 	None specified	None specified	None specified	<ul style="list-style-type: none"> • Religious institutions • Nonprofit membership organizations • Educational institutions • Health care institutions • Correctional facilities • Entertainment facilities • Lodging establishments • If a covered restaurant shares a space with an exempt establishment, it must comply with the law 	<ul style="list-style-type: none"> • Kitchens preparing food in institutional settings, such as schools, group residences or prisons • Markets, grocery stores, and convenience stores • Private clubs or membership associations • Temporary food establishments • Caterers • Vending machines 	<ul style="list-style-type: none"> • Certified farmers' markets • Licensed health care facilities • Public and private school cafeterias • Restaurants in grocery stores (unless separately owned) • Commissaries • Mobile support units • Restricted food service facilities • Pharmacies • Vending machines 	<ul style="list-style-type: none"> • Restaurants located inside facilities subject to State Department of Agriculture inspection • Cafeterias located in educational institutions • Health care facilities • Motion picture theaters • Department of Human Services may adopt rules establishing conditions under which menu board serving drive-through area may qualify for a full or partial exemption, only if compliance would violate local land use laws or sign ordinances, or is impracticable due to site-specific conditions 	<ul style="list-style-type: none"> • Grocery stores • Hotels and motels that provide separately owned eating establishments (but do include the separately owned eating establishments if they meet the criteria above) • Movie theaters
Nutritional Information Tracked	<ul style="list-style-type: none"> • Total calories • Total grams of saturated fat • Total grams of trans fat • Total grams of carbohydrates • Total milligrams of sodium 	Total calories	<ul style="list-style-type: none"> • Total calories • Total grams of: <ul style="list-style-type: none"> - saturated fat¹⁷ - carbohydrates • Total milligrams of sodium 	<ul style="list-style-type: none"> • Total calories • Total grams of: <ul style="list-style-type: none"> - saturated fat - trans fat - carbohydrates • Total milligrams of sodium 	Total calories	Total calories	<ul style="list-style-type: none"> • Total calories • Total grams of: <ul style="list-style-type: none"> - saturated fat - trans fat - carbohydrates • Total milligrams of sodium 	Total calories	Total calories	<ul style="list-style-type: none"> • Total calories • Total grams of: <ul style="list-style-type: none"> - saturated fat¹⁸ - carbohydrates • Total milligrams of sodium 	<ul style="list-style-type: none"> • Total calories • Total grams of: <ul style="list-style-type: none"> - saturated fat - trans fat - carbohydrates • Total milligrams of sodium 	Total calories
Seasonal Products Explicitly Excluded?	Food or beverage item on menu for fewer than 30 calendar days per year	Food on menu for fewer than 30 days per calendar year	Food on menu for fewer than 90 days per year	Food products or menu items on the menu for fewer than 90 days per calendar year	None	None	Food on the menu for fewer than 30 days per year	Food on the menu for fewer than 90 days per calendar year	Food on menu for fewer than 30 days per year	Food or beverage item on menu for fewer than 180 days per calendar year	Food on menu for fewer than 90 days per year	Items offered fewer than 90 days per year

	NPLAN Model Ordinance	New York City ⁵	King County, Washington ⁶	Multnomah County, Oregon ⁷	Westchester County, New York ⁸	Ulster County, New York ¹⁴	Philadelphia ¹¹	Davidson County, Tennessee ¹²	Massachusetts ¹³	California ^{9,10}	Oregon ¹⁵	Maine ¹⁶
Additional Exclusions	Alcoholic beverages ¹⁹	No additional exclusions	<ul style="list-style-type: none"> Food items served in fewer than 15 locations of the chain Food identified only by food tags Unopened prepackaged food Condiments Self-service food Food served by weight or custom quantity Customized orders that change standard menu items Garnishes 	<ul style="list-style-type: none"> Condiments available for use without charge Alcoholic beverages not listed as standard menu items Unopened prepackaged food products not intended to be part of a standard menu item or combination meal (e.g., bag of coffee beans) 	No additional exclusions	No additional exclusions	<ul style="list-style-type: none"> Condiments provided without charge Food sold in its original sealed package with nutrition information required by federal law Custom orders that do not appear on the menu or menu board 	<ul style="list-style-type: none"> Alcohol and alcoholic beverages Food items customized in response to unsolicited customer requests Condiments placed on the table without charge Food sold in its original sealed package with nutrition information as required by federal law 	<ul style="list-style-type: none"> Self-service packaged food that is in a manufacturer's original sealed package and required by federal law to have nutrition labeling 	<ul style="list-style-type: none"> Food or beverage items²⁰ Alcoholic beverages Prepackaged food labeled under the NLEA²¹ 	<ul style="list-style-type: none"> Condiments on tables or counters Food products in sealed manufacturer packing Alcoholic products (The Department of Human Services may adopt rules to require total calorie disclosures for alcoholic beverages only if offered for more than 90 days during a calendar year. But the Department may also adopt rules that exempt alcohol sold in containers or dispensers from the requirement that food tags be used to state standard caloric values) 	<ul style="list-style-type: none"> Condiments or other items offered to customers for general use without charge Food items served at a self-service salad bar or buffet Items sold in a manufacturer's original sealed package that contains nutrition information as required by federal law Custom orders for food or beverage items that do not appear on a menu, menu board, or food display tag
Information on Menu	<ul style="list-style-type: none"> Total calories Total grams of: <ul style="list-style-type: none"> - saturated fat - trans fat - carbohydrates Total milligrams of sodium 	Total calories	<ul style="list-style-type: none"> Total calories Total grams of: <ul style="list-style-type: none"> - saturated fat - carbohydrates Total milligrams of sodium 	Total calories	Total calories	Total calories	<ul style="list-style-type: none"> Total calories Total grams of: <ul style="list-style-type: none"> - saturated fat - trans fat - carbohydrates Total milligrams of sodium 	Total calories	Total calories	Total calories	Total calories	Total calories
Information on Menu Board	Total calories	Total calories	Total calories	Total calories	Total calories	Total calories	Total calories	Total calories	Total calories	Total calories, except on drive-through menu boards	Total calories	Total calories
Information on Food Tags	Total calories on all food tags placed in proximity to food or beverage	Total calories on food tags for food displayed for sale	Explicitly not required	<ul style="list-style-type: none"> Total calories on all food tags Food tags are required on all self-service food not listed on the menu board 	Total calories for menu items with different varieties on display	Total calories for all food tags for food displayed for sale	Total calories	Total calories	Total calories on food tags for food displayed for sale	Total calories on existing food tags if food is displayed inside a display case	Total calories for all food tags for food displayed for sale	Total calories

	NPLAN Model Ordinance	New York City ⁵	King County, Washington ⁶	Multnomah County, Oregon ⁷	Westchester County, New York ⁸	Ulster County, New York ¹⁴	Philadelphia ¹¹	Davidson County, Tennessee ¹²	Massachusetts ¹³	California ^{9,10}	Oregon ¹⁵	Maine ¹⁶
Typeface Requirements	Size, typeface, and manner no less prominent than the price	Font and format are at least as prominent in size and appearance as the menu item name or price	<ul style="list-style-type: none"> Menu: Easily readable typeface similar to other information about the menu item, and font is no smaller than 9 points Menu Board: Font size and typeface are at least as prominent as the price 	Size and typeface are easily readable, clear, conspicuous, and at least as prominent in size and appearance as the name or price of the menu item	Calorie values are legible, printed conspicuously, and displayed in a color at least as prominent as the color in which the menu item or price is displayed; the size and typeface should be at least as large as the name or price of the menu item	<p>Term "calories" or "cal" must appear as a heading above a column listing the calorie content of each menu item, or directly adjacent to calorie content value for each menu item.</p> <ul style="list-style-type: none"> Menu Board: Calorie content must be legible, posted clearly and conspicuously, and displayed in a color at least as prominent as the color in which the menu item or price is displayed. Calorie content must be posted in a size and typeface at least as large as the name of the menu item or price, whichever is larger Menu: Calorie content must be legible, printed conspicuously, and displayed in a color at least as prominent as the color in which the menu item or price is displayed. Calorie content must be printed in a size and typeface at least as large as the name or price on the menu Salad bars, buffet lines, cafeteria service, food display cases or arrangements where food is displayed: Calorie content per standard item must be provided next to where the item is offered in a prominent size and typeface and legible from where customers choose the items 	Menu: Size and typeface similar to price and other information provided about each menu item	Font and format are at least as prominent in size and appearance as that used to post either the name or price of the menu item	Listed clearly and conspicuously and adjacent or in close proximity such as to be clearly associated with the name or price of the menu item	Size and typeface are clear and conspicuous	<ul style="list-style-type: none"> For non-self service items, must be readily visible for customer use at the location where the customer orders the menu item For self-service items, must be readily visible in the area where the menu items are displayed Menu and Menu Boards: Must post total calories conspicuously near the other information for the menu item. Total calories must be of a size and typeface no less prominent than the size and typeface used to display the price of the item. If the menu and menu board does not list prices, the total calorie statement must be of a size and typeface no less prominent than the size and typeface used to display the least prominent of any other information stated on the menu or menu board Food Tags: Must contain total calories in a size and typeface no less prominent than the size and typeface used to display the price of the menu item. If prices are not listed, total calories must be of a size and typeface no less prominent than the size and typeface used to display the least prominent of any other information on the tag 	Listed clearly and conspicuously, adjacent to or in close proximity and clearly associated with the item to which the statement refers, and printed in a font and format at least as prominent in size and appearance as the name or price of the item

	NPLAN Model Ordinance	New York City⁵	King County, Washington⁶	Multnomah County, Oregon⁷	Westchester County, New York⁸	Ulster County, New York¹⁴	Philadelphia¹¹	Davidson County, Tennessee¹²	Massachusetts¹³	California^{9,10}	Oregon¹⁵	Maine¹⁶
Substitutions for Menu Labeling Provisions Permitted	<ul style="list-style-type: none"> No substitution permitted Additional nutrition information must be made available upon request as a written list, brochure, or pamphlet Additional nutrition information must be made available on a poster that is visible at the point of purchase 	No substitution permitted	<p>For menu item labels:</p> <ul style="list-style-type: none"> Menu insert Menu appendix Supplemental menu Electronic kiosks <p>For menu board labels:</p> <ul style="list-style-type: none"> Sign adjacent to menu board Sign in queue at eye level 	<ul style="list-style-type: none"> No substitution permitted for menu and menu board labels Restaurants may propose substitutions for self-service item, variable item, combination meal, and shared meal labels; substitution proposal must demonstrate that at least 75% of patrons see the nutrition information before they place their orders Additional nutrition information must be made available in a supplemental menu, menu insert, brochure or printed handout, or electronic kiosk when requested by the customer 	Department of Health may approve and menu board substitutions that make the calorie information available at point of purchase and are at least as prominent as the requirements in the law	No substitution permitted	<ul style="list-style-type: none"> Board of Health can approve a substitution if deemed appropriate to protect public health and if it provides the customer with information at the point of decision-making Additional nutrition information must be made available in writing to customers upon request when menu boards and food tags are used in lieu of menus 	Brochures may be used in lieu of food tags on salad bars, buffet lines, or other self-serve arrangements; the brochure must be prominently displayed at the point of serving, and a sign must be posted notifying customers of its availability	No substitution permitted	Substitution of a brochure listing nutritional information about menu items at the drive-thru window is permitted in lieu of labeling drive-thru menu boards	No substitution permitted	No substitution permitted
Menu Items with Multiple Choices	Post median value if high and low are within 20% of median; otherwise, post range	<ul style="list-style-type: none"> Post high and low value of menu items If various food choices are on display, calorie information for each choice must be listed on the food tag 	Post all values or high and low values	<p>For menu items with different options (e.g., sizes, flavors):</p> <ul style="list-style-type: none"> Post median value if high and low within 10% of median Post range if high and low are within 11-20% of median List each option separately if high and low greater than 20% of median <p>For combination meals:</p> <ul style="list-style-type: none"> Post range if nutrition information is available for each of the individual items in the combination meal 	<p>For menu items with different flavors and varieties:</p> <ul style="list-style-type: none"> Post median value if all are within 20% of median; Otherwise, post range If placards identify different varieties on display, the individual values should be listed on the placards If menu items with different varieties are not on display, values for each variety should be provided in a brochure, booklet, kiosk, or other easily accessible device, and signs should indicate its availability 	For menu items with different flavors and varieties but listed as a single item on menu and menu boards: <ul style="list-style-type: none"> Post median value if calorie values for all flavors and varieties within 20% of median Otherwise, post the range of values If placards identify different varieties on display, calories must be listed on placard along with name; if menu item not on display, calorie content must be provided for each individual flavor or variety in writing at point of ordering 	For menu items with different flavors and varieties: <ul style="list-style-type: none"> Post median value if all values are within 20% of median; otherwise, post range If food tags identify different variations, the individual values must be listed on the food tag 	For menu items with different flavors and varieties: <ul style="list-style-type: none"> Post range of values Range does not need to be displayed if food is on display with tags labeling each variety and the calorie value <p>For combination meals:</p> <ul style="list-style-type: none"> Post the range of values for all combinations 	For menu items with different flavors and varieties: <ul style="list-style-type: none"> Post high and low value of menu items on menu boards and menus High and low values do not need to be displayed when calorie content is provided for each flavor or variety of food item <p>For combination meals:</p> <ul style="list-style-type: none"> Post high and low values for all combinations on menus and menu boards If only one possible calorie total for the combination, the total calorie content must be listed on menus and menu boards 	Post high and low value of menu items	For menu items with different combinations: <ul style="list-style-type: none"> Post high and low calorie value of menu items If only one possible total amount of calories, that total must be disclosed 	For menu items listed as a single item but including more than one variety: <ul style="list-style-type: none"> Post median value if calorie values for all varieties within 20% of median; otherwise, post the calorie information for each variety of the item Food tags that identify a specific variety of food or beverage item must disclose caloric information for the specific variety of the item

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Menu Items Serving Multiple People	No special provision	No special provision	No special provision	<ul style="list-style-type: none"> Nutrition information for the entire menu item must be provided The number of intended servings may be listed Nutrition information for pizzas intended to serve more than one person can be listed by the slice or for the whole pizza 	No special provision	No special provision	No special provision	Menu items should indicate the number of servings and the calories per serving	No special provision	Post number of people served and calories per serving, or high and low values if multiple choices	If not an appetizer or dessert but intended to serve more than one person, include the number of persons intended to be served by the menu item and the calorie content information for an individual serving	No special provision
Daily Nutritional Intake Statement	<ul style="list-style-type: none"> Menus and menu boards must include this statement: "The recommended daily caloric intake for an average adult is 2,000 calories; individual calorie needs may vary. Additional nutrition information available upon request" Supplementary pamphlets and posters must include this statement: "The Dietary Guidelines for Americans recommend limiting saturated fat intake to 20 grams and sodium intake to 2,300 milligrams for adults eating 2,000 calories daily. The recommended daily caloric intake for an average adult is 2,000 calories; individual calorie needs may vary. Additional nutrition information available upon request" 	None	Menus and written nutrition information must include this statement: "The Dietary Guidelines for Americans recommend limiting saturated fat to 20 grams and sodium to 2,300 milligrams for a typical adult eating 2,000 calories daily. Recommended limits may be higher or lower depending upon daily calorie consumption"	Menus and menu boards must include this statement: "Recommended limits for a 2,000 calorie daily diet are 20 grams of saturated fat and 2,300 milligrams of sodium. Additional nutrition information available upon request"	None	None	Menus and written nutrition information must include a statement of the current FDA-recommended limits for saturated fat (including trans fat) and milligrams of sodium for a 2,000 calorie diet, as well as this statement: "A 2,000 calorie daily diet is used as the basis for general nutrition advice; individual calorie needs, however, may vary"	Menus and menu boards must include this statement: "The USDA recommends that adults limit calorie intake to 2,000 calories per day; however, individual calorie needs may vary"	None	Brochures must include this statement: "Recommended limits for a 2,000 calorie daily diet are 20 grams of saturated fat and 2,300 milligrams of sodium"	A statement listing the daily intake amounts of calories, saturated fat, and sodium recommended by the Department of Human Services must be posted in a conspicuous place	A menu, menu board, or written nutrition information provided to a customer must contain the following in a clear and conspicuous manner and in a prominent location: "To maintain a healthy weight, a typical adult should consume approximately 2,000 calories per day; however, individual calorie needs may vary"

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Additional Labeling Requirements	None	None	For alcoholic beverages, restaurants can use either individual labeling or average nutritional values specified in the law	<ul style="list-style-type: none"> Restaurants can use average nutritional values for alcoholic beverages specified in the law, but still must provide specific nutritional information about signature drinks Buffets must have nutrition labeling that specifies the size of an individual serving and nutrition information for an individual serving 	None	None	Restaurants that deliver food must provide the required nutrition information on wrappers and boxes in a clear and conspicuous manner	None	<ul style="list-style-type: none"> Alcoholic beverages may be collectively labeled using the average caloric values for wine, beer, light beer, and distilled spirits Collectively labeled alcoholic beverages must also include the statement: "Signature drinks or liqueurs with added ingredients may increase calorie content" (does not explicitly require separate labels for signature drinks) Caloric values must be posted on drive-through menus clearly and conspicuously, adjacent or in close proximity as such to be clearly associated with either the name or price of the menu item 	None	<ul style="list-style-type: none"> A statement that additional nutritional information is available upon request must be posted in a conspicuous place May post disclaimer that actual nutritional value may vary from stated calories or other nutritional information due to variations in preparation, size, or ingredients or for customer orders When calculating values for alcoholic beverages, restaurants must use typical values for wine, light beer, beer, and distilled spirits 	<ul style="list-style-type: none"> Beer, wine, and spirits must post average calorie values on menu board, menu, or tag Food tags, menu, or menu boards for beer, wine, and spirits may include the statement: "Signature drinks or liqueurs with added ingredients may contain increased caloric content" Menu, menu board, or written nutrition information provided to a customer may include the following statement: "Nutrition information is based upon standard recipes and product formulations; however, modest variations may occur due to differences in preparation, serving sizes, ingredients, or special orders"
Phase-In Period	None specified	None specified	<ul style="list-style-type: none"> Five months for labeling inside the restaurant 12 months for drive-thru menu boards 	Nine months	None specified	None specified	None specified	None specified	Franchised outlets may request an extension to posting on menu boards and drive-through menu boards if compliance by November 1, 2010 would impose an extraordinary financial hardship; otherwise, none specified	18 months	Nutritional typical value determination must begin by January 1, 2010	None specified
Preemption	None	None	None	None	Reverse preemption clause nullifying ordinance if federal or state legislation with the same or substantially similar provisions is enacted	None	None	None	None	Broadly preempts local authority to regulate nutritional information disclosure (possibly limited to restaurants, but some ambiguity exists)	Preempts local governments from adopting requirements for determination or disclosure of nutritional information by chain restaurants	Preempts local governments from adopting ordinances regulating the dissemination of caloric or nutritional information or requiring information to be placed on menus, menu boards, or food display tags by chain restaurants

- ¹ Dr. Robert C. and Veronica Atkins Center for Weight & Health. *Potential Impact of Menu Labeling of Fast Foods in California*. 2008. Available at: www.publichealthadvocacy.org/menulabelingdocs/UC-CWH_Menu_Labeling_Report.pdf
- ² In general, we define a stronger menu-labeling law as one that applies to more restaurants and food items, requires restaurants to provide more nutritional information, and requires restaurants to make nutritional information more visible. All of these features will provide consumers with more information about the food that they eat, which may lead to healthier choices. Since menu-labeling laws have only recently taken effect, very little *in situ* research has been conducted on the effects of various menu-labeling law options on consumers' eating habits. See the Rudd Center's *Menu Labeling in Chain Restaurants: Opportunities for Public Policy* for a review of research supporting the provision of more nutritional information to consumers. Available at: www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddMenuLabelingReport2008.pdf.
- ³ Recent unpublished research indicates that the statement of total recommended daily calorie intake paired with calorie counts for menu items may have a stronger effect on consumers' calorie consumption than just the calorie counts alone. (Roberto CA, Larsen PD, Agnew H, et al. *The positive impact of menu labeling on food choices and intake: Evaluating a public health intervention for obesity*. Submitted for publication.)
- ⁴ This chart does not include the most recent menu labeling laws from Massachusetts; Suffolk County, New York; and Ulster County, New York. These laws will be included in the next version of this chart.
- ⁵ Available at: www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50-0108.pdf
- ⁶ Available at: www.kingcounty.gov/healthservices/health/nutrition/healthyating/~/media/health/publichealth/documents/boh/reg0802.aspx
- ⁷ Available at: www.co.multnomah.or.us/health/chronic/documents/MultCoNutritionLabelingRules.pdf
- ⁸ Available at: www.westchestergov.com/Health/SanitaryCode/CalorieLabelingLaw_No.13_2008.pdf
- ⁹ Available at: www.leginfo.ca.gov/pub/07-08/bill/sen/sb_1401-1450/sb_1420_bill_20080930_chaptered.pdf
- ¹⁰ We analyze the California law according to the provisions effective on January 1, 2011.
- ¹¹ Available at: <http://webapps.phila.gov/council/attachments/5823.pdf>
- ¹² Available at: <http://health.nashville.gov/MenuLabeling/MenuLabeling20090205FINAL.pdf>
- ¹³ Available at: www.mass.gov/EcoHhs2/docs/dph/legal/calorie_regulations.doc
- ¹⁴ Available at: www.co.ulster.ny.us/resolution-archives/2009/LL%20No.%201%20of%202009.pdf
- ¹⁵ Available at: www.leg.state.or.us/09reg/measures/hb2700.dir/hb2726.b.html
- ¹⁶ Available at: www.mainelegislature.org/legis/bills/bills_124th/chappdfs/PUBLIC395.pdf
- ¹⁷ In 2007, King County banned trans fat from all food establishments.
- ¹⁸ In 2008, California banned trans fat from restaurants.
- ¹⁹ The NPLAN model ordinance excludes alcoholic beverages because most states strictly regulate alcohol and a locality may be preempted from regulating it. If a locality is not preempted, it may require chains to post nutritional values for alcoholic beverages.
- ²⁰ A hem is a condiment.
- ²¹ Nutrition Labeling and Education Act of 1990.

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