

Are You Prepared To Comply With FDA's Menu Labeling Rule? Do You Need To?

By: Anna M. Wiand, Esq.
GrayRobinson's Food Law Practice Group

April 25, 2017

On May 5, 2017 the U.S. Food and Drug Administration ("FDA") is slated to begin enforcing its Menu Labeling Rule. The Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments rule ("Menu Labeling Rule"), authorized by Patient Protection and Affordable Care Act ("ACA") and the codified at 21 CFR 101.11, applies to retail food establishments with twenty (20) or more locations, which the Rule calls "covered establishments." After an almost two-year implementation delay, covered establishments now have less than two weeks to comply with the Menu Labeling Rule.

Covered establishments may include bakeries, cafeterias, coffee shops, convenience stores, delicatessens, food service facilities and concession stands located within entertainment, food service vendors, food takeout or delivery establishments, grocery stores, retail confectionary stores, superstores, quick service restaurants, and table service restaurants. Notably, ownership is not determinative of whether an establishment is considered "covered." Therefore, this Rule applies to franchisees owning and operating only one establishment if that establishment is part of a chain of 20 or more establishments doing business under the same name and selling substantially the same menu items.

Under this Rule, a covered establishment must:

- Clearly and conspicuously display calorie information for standard items on menus and menu boards, next to the name or price of the item.
- Provide on the menu or menu board a succinct statement regarding recommended calorie intake.
- Provide on the menu or menu board a statement regarding the availability of additional written nutritional information.
- Develop and maintain written information for standard menu items which provides the amount of total calories, calories from fat, total fat, saturated fat, trans fat, cholesterol, sodium, total carbohydrate, dietary fiber, sugars, and protein in that item. This information may be provided to consumers via a counter card, sign, poster, handout, booklet, loose-leaf binder, menu, or electronic device or by other similar means

The aforementioned requirements only apply to standard menu items. A standard menu item is a restaurant-type food that is routinely included on a menu or menu board or routinely offered as a self-service food or food on display. The menu labeling requirements typically will not apply to (i) seasonal menu items offered for sale as temporary menu items, (ii) daily specials, or (iii) condiments for general use typically available on a counter or table.

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The calorie information and required statements must appear on all menus. A “Menu or menu board” means the primary writing of the covered establishment from which a customer makes an order selection.” 21 C.F.R. § 101.11(a). Factors used to determine whether a writing is a “menu” include:

- Does it list the name of a standard menu item (or an image depicting the standard menu item)?
- Does it list the price of the standard menu item?
- Can the writing be used by a customer to make an order selection at the time the customer is viewing the writing?

Accordingly, some promotional materials may be deemed a menu if they meet these factors. For example, a coupon for pizza stating “One large pepperoni pizza for \$9.99” that includes a phone number a consumer could use to order the pizza, may be considered a menu and therefore must have the calorie information and required statements.

Hopefully, this brief synopsis of FDA’s Menu Labeling Rule will help you to (1) determine if your establishment is subject to the FDA’s Menu Labeling Rule, and (2) prepare for the basic requirements for compliance. Notably, failure to comply can result in the FDA finding your food to be misbranded, which can result in both criminal and civil penalties.

Anna M. Wiand
Associate

P 813-273-5000
F 813-273-5145
anna.wiand@gray-robinson.com

GrayRobinson, P.A,
401 East Jackson Street
Suite 2700
Post Office Box 3324 (33601-3324)
Tampa, Florida 33602