

## Legal Fact Sheet for Massachusetts Food Donation: Date Labeling Laws - July 2015

Date labels are the dates on food packaging that are accompanied by phrases such as “use by,” “best before,” “sell by,” “enjoy by,” and “expires on.” Date labels can lead to food waste because they are misleading to consumers and result in safe, wholesome food being needlessly thrown away. Furthermore, date labels impact food donation in Massachusetts, because Massachusetts state law sets additional conditions on the sale or donation of any food once the labeled date has passed.

### Federal Law on Date Labels

There currently is no federal law regulating date labels.<sup>1</sup> Congress has, however, passed legislation delegating general authority to the FDA and the USDA to ensure food safety and protect consumers from deceptive or misleading food labeling.<sup>2</sup> Unfortunately, the FDA and the USDA have not interpreted this authority to allow them to regulate date labels, thus:

- The FDA does not require date labels on foods, other than infant formula.<sup>3</sup>
- The USDA does not require date labels on foods under its purview, including meats, poultry, and egg products.<sup>4</sup> If, however, USDA-regulated foods are dated, either as required under state law (see below) or voluntarily, they must include: (1) a day and month (and year for frozen or shelf-stable products) and (2) an explanatory phrase, such as “sell by” or “use before.”<sup>5</sup>

### Massachusetts State Law on Date Labels

Because federal law is so limited, states have broad discretion to regulate date labels. As a result, inconsistent date labeling laws exist across the country.<sup>6</sup> What has been consistent, however, is food manufacturers’ practice of basing these dates on optimal food quality and freshness, not on food safety.<sup>7</sup> Despite this fact, many consumers continue to believe date labels are related to food safety.<sup>8</sup> However, no link has been shown between eating food after its labeled date and foodborne illness.<sup>9</sup>

Massachusetts state law on date labels is among the strictest in the country. Many states have chosen either not to regulate date labels at all or to regulate only one or two foods, such as milk or shellfish.<sup>10</sup> In contrast, Massachusetts generally requires all prepackaged “perishable” (a shelf life of 60 days or less) or “semi-perishable” (a shelf life greater than 60 days but less than 90 days) foods to have date labels.<sup>11</sup> Despite that general requirement, the following categories of foods are exempt from Massachusetts’ date labeling requirements:<sup>12</sup>

- Fresh meat, poultry, fish, fruits, and vegetables that are sold either unpackaged or in a container allowing “sensory examination” (for example, raw chicken or fish selected from a display case);
- Salt and crystallized refined sugar;

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<sup>1</sup> See *Food Product Dating*, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <http://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating> (last visited February 25, 2015).

<sup>2</sup> 21 U.S.C.A. § 331(b) (2015); 21 U.S.C.A. § 343 (2015); 21 U.S.C.A. § 463(a) (2015); 21 U.S.C.A. § 607(c) (2015); 21 U.S.C.A. § 1043 (2015).

<sup>3</sup> *FDA Basics*, FOOD AND DRUG ADMIN., <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm210073.htm> (last updated Jun. 8, 2015); 21 C.F.R. § 107.20 (2012).

<sup>4</sup> See *supra* note 1. The USDA does, however, require a “pack date” for poultry and a “lot number” or “pack date” for egg products certified by the USDA. HARVARD FOOD LAW & POLICY CLINIC AND NAT’L RES. DEF. COUNCIL, *THE DATING GAME: HOW CONFUSING FOOD DATE LABELS LEAD TO FOOD WASTE IN AMERICA* 11 (2013).

<sup>5</sup> 9 C.F.R. § 317.8(b)(32)(i) (2013); 9 C.F.R. § 317.8(b)(32)(2) (2013).

<sup>6</sup> HARVARD FOOD LAW & POLICY CLINIC AND NAT’L RES. DEF. COUNCIL, *supra* note 4, at 14 fig. 4.

<sup>7</sup> See *id.* at 17.

<sup>8</sup> *Id.* at 19.

<sup>9</sup> See *id.* at 19-20.

<sup>10</sup> See *id.* at 14 fig. 4.

<sup>11</sup> See 105 MASS. CODE REGS. 520.119 (2015).

<sup>12</sup> *Id.*

- Bulk foods to be used in the manufacture of other foods, not to be distributed to consumers;
- Individually-packaged foods that are prepackaged as part of a larger food item, so long as the date labels are no sooner than the date label applied to the larger food item (for example, the granola in a yogurt parfait kit);
- Prepackaged foods for retail sale weighing less than 1.5 ounces; and
- Foods manufactured, processed, or stored for sale outside Massachusetts.

In Massachusetts, date labels on prepackaged perishable and semi-perishable foods, as well as any foods that are labeled voluntarily, must meet specific requirements. The date must be accompanied by a description of “recommended storage conditions,” if storage conditions would impact the date on the label.<sup>13</sup> Further, once a date is applied to perishable and semi-perishable foods, it cannot be changed (“recoded”).<sup>14</sup>

Despite the evidence that date labels are unrelated to food safety, Massachusetts (along with nineteen other states and the District of Columbia) sets additional conditions on the sale or donation of any food once the labeled date has passed.<sup>15</sup> Specifically, in order to sell or donate a food that is “past date” in Massachusetts, the food must satisfy three criteria:<sup>16</sup>

- It must be “wholesome” and its sensory qualities must not have “significantly diminished”;
- It must be separated from foods which are not past date; and
- It must be clearly marked as being offered for sale after its sell by or best if used by date.

Only if these criteria are met will the food donor or seller be eligible for protection from liability under The Emerson Act and Massachusetts’ Good Samaritan statute.<sup>17</sup> To ultimately be afforded protection, the food donor or seller must also meet the additional requirements of those laws, as described in *Legal Fact Sheet for Massachusetts Food Donation: Liability Protections*.

Businesses should note that Massachusetts is planning to reform its regulations on date labels within the next year.<sup>18</sup> However, the new regulation makes only very minor changes, including eliminating the date labeling exemption for bulk foods.<sup>19</sup>

## Conclusion

In sum, because there is no federal law on date labeling, regulation of these labels has been left largely to the states. Massachusetts follows one of the most restrictive date labeling laws in the country. In Massachusetts, all prepackaged perishable and semi-perishable foods must have date labels; once applied by the manufacturer, processor, or whoever packaged the food, the date label cannot be changed. Further, Massachusetts is one of twenty states that set additional conditions on the sale or donation of foods after the labeled date. However, past date food may be sold or donated in Massachusetts so long as it meets three criteria regarding wholesomeness, separation from other foods, and identification as past date.

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<sup>13</sup> *Id.*

<sup>14</sup> Telephone interview with Joan L. Gancarski, Food Protection Program of the Mass. Dep’t. of Pub. Health (Nov. 2, 2011).

<sup>15</sup> See HARVARD FOOD LAW & POLICY CLINIC AND NAT’L RES. DEF. COUNCIL, *supra* note 4, at 12, 22; MASS. GEN. LAWS ch. 94, § 328 (2015).

<sup>16</sup> 105 MASS. CODE REGS. 520.119 (2015).

<sup>17</sup> See 42 U.S.C.A. § 1791 (2015); MASS. GEN. LAWS ch. 94, § 328.

<sup>18</sup> See *Food Manufacturing*, MASS. EXEC. OFFICE OF HEALTH AND HUMAN SERV., <http://www.mass.gov/eohhs/gov/laws-regs/dph/proposed-regulations/food-regs.html>.

<sup>19</sup> *Id.*