Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu-Labeling Laws

Jennifer L. Pomeranz, JD, MPH, and Kelly D. Brownell, PhD

Because the rate of consumption of away-from-home meals has increased dramatically, the distinction between requiring nutrition information for packaged but not restaurant products is no longer reasonable.

Public health necessitates that nutrition labels must be included with restaurant menus as a strategy to educate consumers and address the escalation of obesity. Menu-labeling laws are being considered at the local, state, and federal levels, but the restaurant industry opposes such action.

We discuss the public health rationale and set forth the government's legal authority for the enactment of menu-labeling laws. We further aim to educate the public health community of the potential legal challenges to such laws, and we set forth methods for governments to survive these challenges by drafting laws according to current legal standards. (*Am J Public Health.* 2008;98:1578–1583. doi:10.2105/AJPH.2007.128488)

MENU-LABELING LAWS ARE being considered at local, state, and federal levels. Proposed laws have considerable support among health groups but are opposed by the restaurant industry. With these legal efforts being one of most visible public policy strategies to improve nutrition and prevent obesity, it is important to understand the public health rationale, the legal basis, and how the writing and framing of legislation makes it more or less vulnerable to subsequent legal challenges.

THE PUBLIC HEALTH RATIONALE

The modern food environment has prompted the call for menu labeling. Few Americans eat recommended amounts of produce and many overconsume calorie-dense, nutrient-poor foods. Obesity is one consequence, but increased risk for diseases related to poor diet (e.g., heart disease, cancer, diabetes) is a concern for the entire population.

Eating Outside the Home

Consumption of restaurant food has increased dramatically. Restaurant industry sales are projected to be $537 billion by the end of 2007, up from $322.5 billion in 1997.[1] Americans currently spend 47.9% of their food budget on restaurant food.[2]

Quick-service establishments (QSEs) serve what is commonly referred to as "fast food." The 6 largest quick-service chains have 109 072 restaurant units around the world.[3] A 15-year prospective study found that users of fast food visited QSEs on average 2 times a week, whereas the lowest users still patronized them 1.3 times per week.[4] The national average of "heavy users" of fast food, defined as having visited a QSE at least 12 times a month, is 42% of fast-food patrons, up from 38% in 1999.[5]

Fast-food consumption is associated with a higher intake of calories, saturated fat, carbohydrates, and added sugars.[6] Consuming fast food is positively associated with weight gain, insulin resistance, and increased risk for obesity and type 2 diabetes.[4,7,8] The National Institutes of Health postulated that weight gain results because "a single meal from one of these restaurants often contains enough calories to satisfy a person's caloric requirement for an entire day."[9]

Consumer Confusion Over Calories and Nutrition

Requirements for labeling packaged foods and beverages are based on the principle that consumers have the right to know the nutrition content of these items to enable them to make choices better suited to their nutritional needs. Studies have shown that consumers routinely consult food labels[10] and this information influences food purchasing habits by decreasing the purchase of less-healthful items.[11,12] Restaurants are not required to supply similar nutrition information.[13]

With a growing portion of the overall diet consumed at restaurants, and evidence that such eating typically represents poor nutrition, it follows that effective communication of nutrition information in restaurants is a necessary step in educating consumers so they have the option of eating more healthfully.[14–17] Polling data reveal that consumers want nutrition information for the foods and beverages purchased at restaurants (restaurant food).[18–20]

Consumers are unable to correctly estimate the calorie content of restaurant food. One study found that 9 of 10 people underestimated the calorie content of certain items by an average of 600 calories (almost 50% less than the actual calorie content).[12] Another study revealed that even professional nutritionists underestimated the calorie content of restaurant food by 220 to 680 calories (28% to 48% less than the actual calorie content).[21]

Increasing portion size has made calorie estimation more difficult. The only serving size of McDonald's french fries in 1955 is equivalent to the small size now, and the largest serving size today is triple the original serving size.[22] Pricing incentives also add

to the confusion by offering consumers significant increases in the amount of food for relatively small increments in cost. McDonald's large french fries are 157% more calories of food than the small, but only cost 62% more.[23]

Studies have shown that people eat more when served more and presume that what is served or sold in a container is a portion.[24] It is not obvious that at Kentucky Fried Chicken (KFC), the "Chicken and Biscuit Bowl" is 870 calories, but purchasing chicken and biscuits separately (i.e., 2 "original-recipe" drumsticks and a biscuit) cuts the calories almost in half to 480 calories.[25] Menu labels provide one tool for customers to make more-informed decisions and reduce the current confusion over portion sizes and the calorie and nutrition content of restaurant food.

THE LEGAL BASIS FOR INFORMING CONSUMERS

A menu label is the disclosure of nutritional information on a menu or menu board for a food or beverage product. The government has the power to compel these factual disclosures and frequently does so in the commercial marketplace.

Routine Commercial Practice

Requiring the disclosure of factual information is a routine regulatory mechanism in the commercial marketplace. Federal laws require that textile products have labels listing the fiber content, country of origin, and the identity of the business responsible for the item.[26] Likewise, prescription drug advertisements must include ingredient information listed in a prescribed manner.[27]

The Nutrition Labeling and Education Act of 1990 (NLEA) requires purveyors of packaged food and beverages to disclose the ingredients contained in the product and to place a standardized nutrition facts panel on the packaging.[28,29] Menu-labeling laws are another form of mandated factual disclosure. Like the others, they reduce information costs and promote fair dealings, better-informed decisionmaking, and more-efficient commercial markets.[30]

Government's Power to Regulate

The "police power" of states and their political subdivisions confers upon them the ability to enact laws to protect the public's health, safety, and welfare.[31,32] In this vein, states and locales use this power to regulate the sale of products in the name of public health.[33] For example, states require that toys for children of certain ages must be labeled to warn of choking hazards[34] and that products containing mercury be labeled as such to inform consumers of the need to dispose of them as hazardous waste.[35] Menu-labeling laws similarly require vendors to provide information about the nature of the products sold and are a valid exercise of the police power.[36]

There is no question that the government has the authority to require nutrition information in restaurants. Restaurants were exempted from the nutrition labeling requirements of the NLEA,[13] and nothing in the regulations prevent the federal, state, or local governments from requiring this information. In fact, the Menu Education and Labeling Act, which requires the labeling of restaurant food, was introduced in the House in 2003[37] and again in 2007.[38] Moreover, the Food and Drug Administration[39] and the senator[40] and representative[41] responsible for the passage of the NLEA expressly stated that states and locales are free to do the same.

Legislative Intent

When a state or local government enacts regulations, the legislative intent should be clearly set forth. In the case of menu labeling, the intent takes shape around several key suppositions: (1) governments have an interest in protecting the public health and, specifically, in reducing and preventing obesity; (2) governments have an interest and a stake in reducing the cost of obesity and obesity-related diseases; (3) menu labels promote informed decisionmaking by consumers; and (4) menu labels prevent consumer confusion over the calorie and nutritional content of restaurant food.

KEY ISSUES CONFRONTING LAWMAKERS

Which Restaurants Are Affected

Lawmakers must determine which restaurants will be required to post nutrition information. This is a key consideration because some options leave requirements vulnerable to legal challenge. Most of proposed menu-labeling laws require compliance based on the number of units in an establishment's chain nationally, in-state, or both in and out of state.[42,43] Alternative methods proposed require compliance based on annual sales,[44] whether the restaurant has posted nutritional information in the past,[45,46] or a combination of 2 aforementioned requirements.

The means to avoid legal challenges is to require compliance based on the number of units in a chain with the same name, irrespective of ownership. The most common definition requires disclosure from chains with 10 or more establishments nationally,[47–54] but cities and states have proposed numbers ranging from 3 establishments in-state[55] to 30 establishments nationally.[56,57] When ranking the top chain restaurants, the industry itself uses the definition of "more than 5 locations operating under the same name."[58]

A law that bases compliance on gross annual sales is potentially overly broad and underinclusive at the same time. Ill-health effects are associated with fast-food consumption and studies have shown that people frequent QSEs more than independent sit-down restaurants. However, independent restaurants have higher sales figures than QSEs. All of the top-100 independent restaurants had sales of more than $10 million in the year 2006.[59] However, out of

400 chain restaurants, only the top 5 had sales of more than $10 million.[58] Because of the vast difference in the price of a meal at the independent and chain restaurants, basing compliance on sales figures leads to the illogical result of requiring the posting of nutrition information at restaurants that serve relatively few customers, while exempting those that serve many individuals.

A law that bases compliance on whether restaurants previously made nutrition information available (e.g., on Web sites or in pamphlets) also invites legal challenges. New York City passed its original menu-labeling regulation using this definition. The Restaurant Association sued and the court found that the prior disclosure requirement triggered the voluntary claims section of the NLEA, and as such, it was preempted.[60] (Preemption and the NLEA are discussed further in this article.) Even if courts in other jurisdictions come to different conclusions, the Restaurant Association alleged that the prior disclosure requirement chilled the speech of New York City restaurants in violation of the First Amendment. Although the court did not rule on the First Amendment arguments, New York City could have avoided litigating this point if it did not base compliance on prior disclosure.

Menu-Label Specifications

Most proposed labeling laws require restaurants to post the nutritional information on menu boards or on the menus at the point of purchase so the information does not have to be requested or sought out in other ways.[61] Of the 20 proposed or passed menu-labeling laws, 17[42–48,50–53,55,57,62–65] would require at least calories to be posted on menu boards. Sixteen[42–44,46–48,50–53,55,57,63–66] would require that nutritional information be posted on menus and, of that group, most require 2 or more of the following to be disclosed: calories, saturated fat, trans fat, carbohydrates, and sodium.

If lawmakers choose to require only calories on menu boards, it might be beneficial to simultaneously require restaurants to provide full nutritional information of staple products on 1 large board near the menu for consumers to consult. To minimize legal challenges, regulations must not prevent restaurants from including more information than is required by the mandate.

Potential Legal Challenges

The restaurant industry is likely to bring legal challenges to future menu-labeling laws like it did in New York City. There are ways to reduce the chance they will prevail by setting forth legislative intent and by wording statutes in a specific manner. The 4 major legal challenges will involve the First Amendment, the Commerce Clause, equal protection, and the doctrine of preemption.

To survive likely challenges, it is important that legislators set forth the government's public health objectives to show that the law is rationally related to the government's interests in promoting (1) informed decisionmaking, (2) less consumer confusion, and (3) reductions in the toll taken by poor diets. The first 2 are related to the body of case law interpreting the freedom of speech under the First Amendment, and the third is necessary because the government is acting under its police power to regulate public health.

The government's interest in public health is substantial. Cities, states, and the nation are in a crisis situation with regard to the health[67] and financial burdens[68] associated with the increase in obesity. The Supreme Court confirmed that it is permissible for legislatures to implement programs step by step and to adopt regulations that only partially ameliorate a perceived problem, while deferring complete elimination of the problem to future regulations.[69] This counters the oft-heard industry argument that no single change will wipe away the obesity problem. Menu-labeling laws are also rationally related to the government's interest in promoting informed decisionmaking and reducing and preventing obesity.

Preemption. The restaurant industry may challenge a menu-labeling law under the theory that state and local law are "preempted" by federal law, specifically the NLEA. The doctrine of preemption originates in the Supremacy Clause of the Constitution,[70] under which a state law can be explicitly or implicitly preempted. (The same holds true for local laws.) State law can therefore be preempted even if it furthers the same goal as the federal scheme[71] or when it "stands as an obstacle" to the implementation of federal law.[71] When alternative readings of federal law are equally plausible, the Supreme Court attempts to "accept the reading that disfavors preemption."[72(p449)] Moreover, the Supreme Court has acknowledged that in "areas of traditional state regulation," a federal law will not preempt state law "unless Congress has made such an intention 'clear and manifest.'"[72(p449)]

By its terms, the NLEA may only be expressly preempted and cannot be implicitly preempted.[73] The NLEA regulates the industry's voluntary use of nutrient content claims (e.g., low fat) and health claims (e.g., fiber reduces the risk of cancer) on packaging[74] and also mandates that packaged food and beverages have a nutrition facts panel.[28] Restaurant food has been exempted from the required nutrition facts panel labeling but not from the regulated use of voluntary nutrient content and health claims. Therefore states are free to regulate the use of nutrition facts by restaurants, but not restaurants' use of voluntary claims. The most recent court to consider this legal challenge expressly found that states are not preempted by the NLEA from establishing mandatory nutrition labeling of restaurant foods.[60] Therefore, as long as the nutrition information is mandated, it should not be preempted by the NLEA.

The First Amendment. The restaurant industry may challenge a menu-labeling law under the theory that it constitutes an

impermissible burden on commercial speech. The First Amendment guarantees protection to both commercial and noncommercial speech,[75] but less protection is accorded to commercial speech than to other forms of expression.[76] Regulations that compel purely factual commercial speech are subject to even more lenient review than regulations that restrict accurate commercial speech.[77] The Supreme Court explicitly held that, in this context, compelling parties to disclose purely factual information is constitutional if doing so is reasonably related to an appropriate state interest.[77]

The restaurant industry may challenge menu-labeling laws under the First Amendment by alleging that the reasonable relationship test does not apply to menu-labeling laws and a stricter commercial speech test applies instead. This argument is based on the assertion that the government is wrongly compelling restaurants to voice a point of view with which they disagree. However, because a menu-labeling law compels the disclosure of factual information (a calorie is a unit of measure for energy obtained from food and beverages) and not a subjective viewpoint (e.g., fried food is bad), the case law distinguishes between these 2 types of commercial speech because the government has the power to require sellers of products to disclose factual information about their goods.[30] As discussed previously, the government already requires myriad industries to disclose factual information about the products they sell, so this industry argument would disrupt the regulatory scheme currently in place for packaged food, textiles, tobacco products, prescription drugs, and toxic substances, among others.

The industry may also argue that the Supreme Court only applies the reasonable relationship test to disclosure requirements enacted to reduce or avoid consumer confusion. However, most of the appellate courts to consider this argument have not found this to be the case.[35,78,79] Moreover, there is persuasive evidence that consumers are confused about nutrition content of restaurant foods and, as such, this is one motivation of requiring menu labels. Last, the Supreme Court has confirmed that a commercial speaker's "constitutionally protected interest in *not* providing any particular factual information . . . is minimal."[77(p651)] Restaurants do not have a constitutional right not to disclose the nutritional make-up of their products.

The Commerce Clause. The restaurant industry may argue that menu-labeling laws place an undue burden on interstate commerce in violation of the Commerce Clause of the Constitution. The Commerce Clause provides Congress the power to regulate commerce among the states.[80] The Supreme Court has interpreted this as an implicit restraint on state authority, even in the absence of a conflicting federal statute.[81] This implicit restraint is called the Dormant Commerce Clause. To determine whether a law violates this doctrine, courts ask whether it results in "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[82(p99)] Thus, a statute is unconstitutional if it overly burdens out-of-state interests.

Menu-labeling laws are not discriminatory on their face; in other words, they do not explicitly discriminate against one group of restaurants. There is no differential treatment for restaurants held by owners based in, or incorporated under, the laws of one state or another. Any restaurants that fall under the purview of the menu-labeling law must disclose nutrition information on their menu, whether the owners operate only within a state or across multiple states. The fact that in-state restaurant chains would be required to change their menus and, thus, be subject to the same minimal burden, guards against a Commerce Clause violation.[83]

Although menu-labeling laws are neutral from the perspective of the Commerce Clause, courts must determine whether any "incidental" burden on interstate commerce is excessive in light of the benefits of the law.[84] The burden imposed on interstate commerce by menu-labeling laws is minimal. Small costs would be incurred by restaurants required to create new menus and menu boards. This is a diminutive burden because the information is readily available, paper menus can easily be printed, and menu boards are often changed by QSEs. The QSEs use different menus for breakfast, lunch, short-term specials, promotions, and at highway rest stops and full-service restaurants. The fact that Subway restaurants complied with New York City's original menu-label law but did not change their menu boards in the rest of the country supports the validity of these laws under the Commerce Clause.

Notably, the Commerce Clause does not protect the particular structure of retail markets, so a restaurant does not have a valid complaint that it will stop doing business in the location affected by the law.[85] The Commerce Clause protects the interstate market, not particular interstate companies, from minimally burdensome regulations.[85]

Equal protection. The restaurant industry may argue that because menu-labeling laws target certain food-service establishments (i.e., chain restaurants) and not others (i.e., independent restaurants) they violate the Equal Protection Clause. The Equal Protection Clause commands that no state shall deny anyone within its jurisdiction the equal protection of the laws.[86] This provision "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly."[87(p799)] Legislation, like menu-label laws, that does not burden fundamental rights or target certain classes, will survive an equal protection challenge if it is rationally related to a legitimate government interest.[87]

The Supreme Court confirmed that it will "presume the constitutionality" of regulations that meet this rational relationship test.[69] Because states are accorded wide latitude in the regulation

of public health and their local economies under their police powers,[69] regulations like menu-labeling laws are likely to be upheld. The Supreme Court confirmed that "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group."[88(pp632–633)]

The lawyers who represent the chain restaurants that sue the government to prevent the enforcement of menu-labeling laws may argue that these laws unfairly target chain restaurants over independent restaurants, but it is in the government's interest to do so. Chain restaurants' products have been shown to be obesogenic, and their ubiquity and the frequency of consumer consumption warrants different treatment. The government would legitimately be treating establishments according to their relative influence on public health.

CONCLUSIONS

The current positive legislative climate surrounding menu-labeling laws is part of a larger effort to address issues of diet and obesity. Public health laws have greater potential for benefit if there is a strong public health rationale underlying government action. Laws must also be legally sound so as to minimize exposure to subsequent legal challenges. With this article, we have presented the public health rationale for menu-labeling laws and have alerted legislators, regulators, and legal experts to ways laws can be initially written and subsequently defended. Such legal and public health input is important prior to drafting any law on nutrition and obesity.

Specific to menu-labeling laws, both legal theory and experience to date suggest that laws can withstand legal challenge if written in ways that avoid claims of preemption and do not violate assumptions based on the First Amendment, the Commerce Clause, and the Equal Protection Clause. ■

About the Authors

Jennifer L. Pomeranz is with the Rudd Center for Food Policy & Obesity, Yale University, New Haven, CT. Kelly D. Brownell is with the Rudd Center for Food Policy & Obesity and Department of Psychology, Yale University, New Haven.

Requests for reprints should be sent to Jennifer L. Pomeranz, Director of Legal Initiatives, Rudd Center for Food Policy & Obesity, Yale University, 309 Edwards St, Box 208369, New Haven, CT 06520-8369 (e-mail: jennifer.pomeranz@yale.edu).

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J.L. Pomeranz was the lead author of the article. K.D. Brownell contributed to and organized the article. Both authors conceptualized the content and reviewed drafts of the article.

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