

Food & Beverage Legislation And Regulation To Watch In 2015

By **Andrew Westney**

Law360, New York (January 02, 2015, 3:03 PM ET) -- The U.S. Food and Drug Administration will put an expansive menu-labeling rule into effect while state and federal legislators weigh measures to govern labeling foods with genetically modified organisms, just two of the food and beverage regulations and legislation that attorneys should be watching in 2015.

FDA's Final Rules on Menu Labels

The FDA issued final rules for menu and vending machine labeling in November that require chain restaurants, grocery stores and other food establishments to list caloric information on menus. The long-awaited regulations are intended to provide consumers with easily understood health information about their dietary choices.

Attorneys say the rules were more expansive and could have greater reach than anticipated.

The menu-labeling law, passed in 2010 as part of the Affordable Care Act, applies to food establishments that have at least 20 locations, including fast-food restaurants, convenience stores and coffee shops as well as entertainment venues such as movie theaters, amusement parks and bowling alleys.

"I think it's going to be really hard to comply with that," Crowell & Moring LLP partner Cheryl A. Falvey said.

The FDA's menu rule was welcomed by restaurants to some extent because it replaced a patchwork of state regulations, according to Faegre Baker Daniels LLP partner Sarah Brew. But the rule also sweeps in entertainment establishments beyond the typical food manufacturing and retail clients that are looking for help before the rule's Dec. 1 compliance date, Brew said.

"Now we're getting calls from folks who thought this would never apply to them," Brew said.

The Food Safety and Modernization Act

The FDA is slated to issue final rules implementing several provisions of the Food Safety and Modernization Act, which is "a paradigm shift from a regulatory standpoint," according to Kelley Drye & Warren LLP partner Sarah Roller.

"The FDA will have a huge responsibility in just writing the rules," Roller said.

The agency will issue four final rules in 2015 following a consent decree in California federal court to settle litigation brought by the Center for Food Safety. These include preventive controls for human and animal food by Aug. 30, and foreign supplier verification, produce safety and third-party auditor accreditation rules by Oct. 31.

The foreign supplier verification rule is creating anxiety among food companies as it essentially makes them responsible for vouching that their suppliers meet FDA requirements, Brew said.

“When you think about that, that’s a huge thing to say,” Brew said. “But that’s basically what the FDA is requiring for importers and food producers in the U.S. using foreign products.”

Companies will have to do a lot of work to get ready for the new rule, including negotiating contracts with suppliers, rethinking specifications for ingredients and requesting more information from suppliers, Roller said.

“Once these regulations are in place, if you as a food manufacturer don’t have a written food safety plan that describes how you were going to control for salmonella to make sure it doesn’t end up in your food, that in and of itself is a violation and the FDA can take action,” Crowell & Moring partner John Fuson said.

The Safe and Accurate Food Labeling Act of 2014

The proposed federal legislation to stop states from enacting laws requiring labeling of genetically modified foods could relieve food companies of the burden of dealing with different types of GMO regulation from various states, experts say.

HR 4432, introduced in April by Reps. Mike Pompeo, R-Kan., and G.K. Butterfield, D-N.C., would allow only the FDA to impose mandatory labeling on genetically modified foods if they are unsafe or “materially” different from nongenetically modified foods.

“I really believe that at some point the U.S. Congress is going to step in, because the last thing that our economy needs at this point is to have 50 different versions of what constitutes genetic engineering of food that is deemed to be either appropriate or inappropriate,” Womble Carlyle Sandridge & Rice LLP partner Kurt D. Weaver said.

Earlier this month, Vermont Rep. Kate Webb defended her state's first-in-the-nation GMO labeling law as she testified before Congress against the bill, saying it would stymie consumers' desire to make informed decisions about the food they buy.

The FDA typically approaches the GMO issue differently from state legislatures, focusing chiefly on the potential safety risk of GMO foods rather than the consumer’s right to know about food ingredients, Fuson said.

“In a number of instances, I think they’ve clearly made the decision that they do not pose such a risk,” Fuson said.

U.S. Department of Agriculture on Meat Labeling

In October, for the third time in three years, the World Trade Organization faulted U.S. labeling

requirements for pork and beef, finding the regulations still discriminated against Canadian and Mexican imports despite the government's efforts to comply with earlier adverse rulings.

A WTO compliance panel said that the amended version of the country-of-origin labeling, or COOL, regulations rolled out in May 2013 had not sufficiently addressed the shortcomings flagged by the original dispute settlement panel and the WTO Appellate Body.

Canada and Mexico are “fiercely opposed” to the rules, fearful that they impose a heavy labeling burden and could hurt sales if consumers decide they only want to buy U.S. meat, according to Bryan Cave LLP associate Sarah Ahmed Holman.

The U.S. sought to address its loss in earlier rounds of WTO litigation by amending the labeling regulations to include information about where each of the production steps — including slaughtering and packaging — takes place, a move that the panel said actually worsened the rules' discriminatory effects in some instances.

With the WTO still saying the COOL rules violate international trade rules, Canada and Mexico could be ready to start a trade war, Ahmed said.

“It’s going to be really interesting to see what happens — whether the USDA is going to continue to enforce these rules, or whether it is going to abstain from what Canada and Mexico are doing,” Ahmed said.

Berkeley, California, Sugary Drink Tax

After then-New York City Mayor Michael Bloomberg’s attempt to impose a soda ban for businesses regulated by the city's health board was struck down by the state’s highest court in late June, a city across the country took up a crackdown on sugary drinks.

Berkeley, California, voters approved Measure D in November, imposing a general excise tax of 1 cent per ounce on the distribution of sugar-sweetened beverages as well as the sweeteners used in the drinks as of Jan. 1.

The city’s overwhelming approval of the measure, the country’s first-ever tax on sugary drinks, strikes a blow to a soda industry that poured \$11.5 million into defeating soda-tax proposals in Berkeley and San Francisco, where the effort failed. Supporters of Berkeley’s measure argued that it would help combat obesity, diabetes and tooth decay.

The tax could be a harbinger of other state and local initiatives affecting the food and beverage industry, according to Shook Hardy & Bacon LLP partner Madeleine M. McDonough.

“There are more and more control efforts brought by industry critics, and I think those have the potential to lead to litigation as well,” McDonough said.

--Additional reporting by Jonathan Randles, Alex Lawson, Karlee Weinmann, Sindhu Sundar and Kurt Orzeck. Editing by Chris Yates.