

DATE LABELS:

The Case for Federal Legislation



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INTRODUCTION

A staggering 40% of food goes to waste each year in the United States.¹ This waste is not only expensive – costing the U.S. more than 1% of its yearly GDP² – it also contributes to food insecurity, squanders natural resources, and causes lasting environmental damage. The majority of American food waste comes from consumer-facing businesses and homes.³ One key cause of food waste in America is inconsistent and confusing date labels on food packaging.⁴ Date labels on foods are not federally regulated, and thus vary from state to state and across food products. Contrary to many consumers' beliefs, date labels generally have no relation to a food's safety. While a box of crackers or a package of cereal might not taste as fresh after the date, they are still completely safe. But consumers who mistakenly believe that date labels are indicators of safety needlessly throw away these and many other food products every day.

In addition to consumer confusion, the lack of federal oversight over date labels results in inconsistent

Current state laws and voluntary initiative are not enough to fix our broken system of date labels:

- (1) State and industry initiatives cannot fully cure national inconsistency in date label terms,**
 - (2) State-level and voluntary initiatives cannot provide comprehensive education to consumers nationally, and**
 - (3) Voluntary initiatives cannot achieve universal standardization.**
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state laws that require a patchwork of different labels and often restrict sale of past-date foods.⁵ Date label confusion results in an estimated \$29 billion in wasted consumer spending each year.⁶ Waste related to date labels also occurs throughout the supply chain, especially in the retail sector.⁷ This inconsistency, confusion, and resulting waste due to date labels is unnecessary and preventable.

To reduce confusion and unnecessary waste, standard date labeling language is needed. Federal legislation to standardize date labels could alleviate consumer confusion and reduce food waste in American homes and consumer-facing businesses, and can be implemented at very little cost to government and industry. Federally-standardized date labels have the potential to divert an estimated 398,000 tons of food waste and provide the U.S. a total economic value of \$1.8 billion.⁸

Although the large majority of date labels are used to indicate freshness and quality, for some foods there is an increased food safety risk after the date. Standard labels should distinguish between dates used to indicate quality and those that indicate safety.⁹ Standard labeling language must also be accompanied by consumer education and coordinated across government and industry, so that consumers understand the meaning of these date labeling phrases and can make informed decisions about when to discard food products.

At a minimum, federal legislation should include the following:

- (1) standardized date labeling phrases for quality and safety,**
 - (2) eliminate bans on sale past the quality date, and**
 - (3) provide for nationwide consumer education.**
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The time is ripe for date label standardization. A number of industry and state government initiatives are already underway to clarify date labels. For example, in 2017, the Grocery Manufacturers Association (GMA) and the Food Marketing Institute (FMI) launched the voluntary Product Code Dating Initiative to encourage manufacturers to use standard date labeling language.¹⁰ According to the FMI-GMA Product Code Dating Initiative, participating companies would use one label on each food product – a standard quality label to indicate quality or freshness, or a standard discard label for food with an increased risk over time. Additionally, several state governments, including California, Massachusetts, and New Jersey recently introduced or passed legislation to create standard date labels.¹¹ All of these initiatives demonstrate a growing effort to reduce consumer confusion around date labels.

Voluntary industry initiatives and isolated state laws, however, are not enough to achieve standardization of date labeling language. According to our analysis presented below, the FMI-GMA voluntary labels conflict with required language for at least one food product in 27 states, meaning that manufacturers and retailers in those states cannot use the voluntary standard and still remain compliant with state law.

Federal action is necessary to fix our broken system of date labels on foods. Congress can pass legislation to ensure that standard labels are used across the country on all foods, and can preempt unreasonable restrictions on past-date sale or donation, reducing the unnecessary waste of wholesome food. Standardizing date labels also will create an opportunity for the development of a national consumer education campaign, coordinated across industry and the public sector, to ensure standard labels have the desired outcomes when consumers bring foods home. This issue brief will make the case for federal action to standardize date labels by laying out the background on why the current date labeling system causes confusion and food waste; analyzing the weaknesses in private voluntary initiatives and patchwork state legislative solutions; and finally, making specific recommendations for addressing date labels through federal legislation to ensure the desired

impact of consumers, businesses, and governmental agencies understanding the proper meaning of date labels.

BACKGROUND

The combination of inconsistent state laws and the dizzying variety of date labeling terms on food products leaves many consumers confused about how to interpret date labels. The Harvard Law School Food Law and Policy Clinic (FLPC) and the Natural Resources Defense Council examined this issue in our 2013 publication, *The Dating Game: How Confusing Date Labels Lead to Food Waste in America*.¹² This study found that confusion causes disposal of food that is safe to consume simply because it is past the labeled date. Moreover, the current date labeling system does not clearly communicate foods that actually do pose a safety risk if consumed past-date, such as ready-to-eat foods that are not cooked prior to consumption, which may pose a risk of *Listeria monocytogenes*.¹³

Federal law does not regulate the use of date labels on most food products,¹⁴ leaving states and localities to create their own date label laws. *The Dating Game* found that 41 states and Washington D.C. require date labels on at least some food products, and 20 states restrict sale or donation past the date.¹⁵ No two states have the same policy. New York, for example, does not require date labels on any products, but all 6 of its neighboring states—New Jersey, Pennsylvania, Connecticut, Massachusetts, Vermont, and Rhode Island—impose date labeling requirements on some food products.¹⁶ In some states, regulations prohibit or restrict the sale or donation of past-date food products, causing needless waste because the restrictions are not grounded in food safety. For example, Montana prohibits the sale of milk more than twelve days past pasteurization,¹⁷ even though milk is generally still safe and tasty for twice that amount of time.¹⁸ This patchwork system is difficult to navigate for companies and consumers alike.

In addition to widespread inconsistency in labeling laws and regulations, consumers are confused about what date labels actually mean. Even in states that require a date label, manufacturers have broad discretion over how the dates on foods are selected. Date labels typically represent the manufacturer's estimation of best quality and taste; they are not intended to indicate when the food product is no longer safe to eat.¹⁹ However, businesses, individuals, and state and local regulators often misunderstand these quality dates and interpret them to be indicators of safety. In a national survey by FLPC, the Johns Hopkins Center for a Livable Future, and the National Consumers League, 84 percent of consumers reported at least occasionally discarding food close to or past the date on its package, and one-third of consumers report they always do so.²⁰

Aware of this issue, industry, advocates, and nonprofits have begun working to standardize and clarify date labels. In 2016, Walmart began requiring a standardized date label for suppliers of its private label nonperishable foods. This requirement ensures that all Great Value products labeled for quality reasons utilize a “Best if used by” label.²¹

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The most influential effort to date has been the voluntary Product Code Dating Initiative, launched in 2017 by the Food Marketing Institute (FMI) and the Grocery Manufacturers Association (GMA), the two largest food industry trade groups in the U.S. The Product Code Dating Initiative encourages manufacturers and retailers to use standard date labels on consumer-facing food packages.²² Participating companies will ensure their food products use only one of two standard phrases: “BEST

If Used By” on food products for which the labels intend to communicate an estimation of a food’s peak quality and “USE by” on food products where they intend to communicate the date at which a high-risk food should be discarded.²³ The Product Code Dating Initiative set a goal of achieving widespread industry adoption by January 2020, though they encourage companies to take action earlier if possible.²⁴ The initiative has garnered substantial industry support; GMA reports that 87 percent of their members’ products had adopted the standard labels as of December 2018, and they anticipate 98 percent compliance by January 2020.²⁵

Building on this initiative, the Consumer Goods Forum, which includes global companies such as Tesco, Kellogg’s, Walmart, Campbell’s, Nestle, and Unilever, issued a Call to Action asking retailers and food producers to simplify date labels and issue consumer education for interpreting them by 2020.²⁶ The Call to Action encourages the use of only one date label per food item: either a quality date for non-perishable items or an “expiration date” for perishable items.²⁷ The Forum offers the language “Best If Used By” and “Use By” as examples of quality and expiration dates, but it acknowledges that the specific language used must vary according to regional regulations, including date labeling regulations globally as well as variable state laws.²⁸

The momentum on date label standardization extends to governmental actors. In 2016, the U.S. Department of Agriculture (USDA) revised its guidance to industry to recommend that manufacturers use the term “Best if Used by” when they are labeling for the purpose of indicating a product’s quality.²⁹ In May 2019, FDA released a letter similarly encouraging the food industry to use the phrase “Best if Used by” on food products to indicate quality.³⁰ This phrase is the same standard quality language used by Walmart and the Product Code Dating Initiative. In April 2019, the U.S. Environmental Protection Agency (EPA), U.S. Food and Drug Administration (FDA), and USDA released a new Winning on Reducing Food Waste Federal Interagency Strategy, which outlined six priority action areas for addressing food waste, including clarifying date labels.³¹ In addition, in recent years, states including California,³² Massachusetts,³³ New Jersey,³⁴ and Hawaii³⁵ have all introduced legislation to standardize date labels on food at the state level. California’s date labeling bill was signed into law in October of 2017. The law encourages food companies to use the terms “BEST if Used by” or “BEST if Used or Frozen by” to indicate quality, and “USE by” or “USE by or Freeze by” to indicate safety.³⁶ These federal, state, and private sector initiatives represent growing recognition of both the cost to consumers and the enormous potential of standardized date labels to reduce food waste nationally.

Federal action is necessary to fix our broken system of date labels on foods. Congress can pass legislation to ensure that standard labels are used across the country on all foods, and can preempt unreasonable restrictions on past-date sale or donation, reducing the unnecessary waste of wholesome food.

WEAKNESSES IN EXISTING INITIATIVES

The FMI-GMA Product Code Dating Initiative, Consumer Goods Forum Call to Action, and various other industry and state government initiatives illustrate widespread appreciation of the need for clearer date labels to reduce food waste. Despite encouraging action and alignment by industry and government on the need for change and on the standard terms to be used, full adoption of the standard language and implementation of the necessary education will require action by the federal government.

Industry and state-level reform efforts are limited in three important ways, described in detail below. First, they are limited in their ability to cure widespread inconsistency in date labels. Our 50-state

analysis of the existing date label regulations found that the Product Code Dating Initiative would conflict with existing state-level regulations for at least one food product in 27 states, preventing full implementation of the standard. Second, because these initiatives cannot fully standardize date labeling language nationally, and because they are not enshrined in law, they cannot address the difficulty of providing consistent education to consumers. Finally, in the case of those products that do not bear the standard terms, either because the company chooses not to comply with the standard or because the company is complying with a conflicting state law, consumer misperceptions may actually be heightened.

a. State and industry initiatives cannot fully cure inconsistency.

Neither state-level solutions nor voluntary initiatives are sufficient to fully address inconsistent date labeling language. As noted above, no two states have the same date label rules. Even among states that are attempting to remedy unclear date labels, the solutions may perpetuate this patchwork of state laws. In the 2017-18 legislative session, 11 state bills related to date labeling were introduced, 5 of which were signed into law.³⁷ Of the 11 bills, 4 proposed standard date labeling terms; the other bills repealed or made other changes to existing date labeling requirements.

Even among those states proposing standard labels, the legislation varies in terms of the label language and the instructions as to which foods would be labeled with which terms. A quick review of those proposed in the 2017-18 legislative session is indicative. For example, California's recently-passed legislation requires the Department of Food and Agriculture and the Department of Public Health to encourage food manufacturers, processors, and retailers to use the terms "BEST if Used by" or "BEST if Used or Frozen by" to indicate quality, and "USE by" or "USE by or Freeze by" to indicate safety.³⁸ Hawaii's proposed legislation would encourage the state health department and agriculture department to encourage manufacturers, processors, and retailers to use these same phrases on food products.³⁹ The Massachusetts bill would require use of the term "expires on" on ready-to-eat products determined to pose a significant safety risk if eaten past a certain date, and would allow for the use of "best if used by" on other food products not designated as high risk.⁴⁰ New Jersey's proposed legislation would require use of the term "BEST if Used By" on any food products the manufacturer chose to label to indicate product quality, and use of the term "USE by" on products the manufacturer chose to label to indicate elevated risk.⁴¹ Each of these state bills calls for different labels and on different products, and while each presents an improvement over current law, adding these individual states



to the patchwork of state laws nationally is ineffective at achieving widespread consistency in date labeling. In light of this national challenge, New Jersey also introduced a resolution urging Congress and the President to create a national uniform standard date labeling system.⁴²

In terms of industry action, the Product Code Dating Initiative takes an important and commendable step towards achieving national consistency and attempting to address consumer confusion. If an initiative like this were adopted universally, it could drastically reduce consumer confusion over the meaning of date labels and reduce the amount of food that goes to waste. The initiative has garnered substantial support; however, adoption still is not universal. Even if, as GMA projects, 98% of its members adopt the voluntary standard, some GMA members will not comply, and manufacturers of many products that are not part of GMA may not utilize the standard.

More importantly, the initiative is inconsistent with state laws in over half of states, preventing full compliance. Of the states with laws requiring or regulating the use of date labels,⁴³ 27 states have date label laws that conflict with the Product Code Dating Initiative for at least one food product.⁴⁴ These conflicts occurred most often for shellfish⁴⁵ (9 states), eggs (9 states), and milk and dairy products (8 states). Specifically, FLPC identified four types of conflict between state date label laws and the Product Code Dating Initiative, described below.⁴⁶ More detail on these conflicts in specific states can be found in the Appendix.

State law requires specific label language that conflicts with the Product Code Dating Initiative

The Product Code Dating Initiative utilizes the label “BEST If Used By” for shelf-stable foods, such as crackers or canned goods, and “USE By” for certain perishable foods that pose a food safety risk if consumed past-date.⁴⁷ However, 19 states require specific date label language that differs from FMI-GMA’s recommended language, either requiring language other than “BEST If Used By” for products that are shelf-stable or other products that do not cause an increased food safety risk if consumed past-date, or requiring language other than “USE By” for highly perishable food products. For example, many states require use of the term “sell by” for certain products,⁴⁸ which historically was intended as an indicator to retailers of the date for stock rotation purposes, not a date relevant to consumers, and not utilized in the Product Code Dating Initiative.

State law requires a date label related to a specific process that occurs in food manufacturing

Laws in 7 states require date labels that are related to steps in food manufacturing or processing, as opposed to food quality or perishability. For example, Colorado requires that eggs be marked with their pack date,⁴⁹ and Montana requires that milk have a pasteurized date.⁵⁰ These date labels conflict with the standards of the Product Code Dating Initiative because they provide information unrelated to when the product will be freshest or safest. Although these dates may communicate information that is relevant to manufacturers or retailers, they are confusing for consumers and contribute to unnecessary waste of wholesome food. The Product Code Dating Initiative Implementation Guide indicates that although additional information for stocking and rotation purposes, such as “packed on,” may sometimes be used, it should only be included in “rare instances” for “highly perishable food products such as sliced deli meat.”⁵¹ State laws requiring this information on consumer-facing food packages conflict with the Product Code Dating Initiative,⁵² and contribute to confusion and waste.

State law requires multiple dates on a package

State regulations that require multiple dates on food products are in conflict with the Product Code Dating Initiative, even when one of the dates fulfills the criteria of the initiative. This is because the Product Code Dating Initiative stipulates that, to prevent consumer confusion, only one date is permitted on any food package. Laws requiring multiple dates exist in 4 states. For example, Wisconsin requires both a pack date and either a “sell by” or “use by” date on eggs.⁵³

State law prohibits sale past a quality date

Finally, 10 states prohibit the sale or donation of foods past the date, even if the date is a quality indicator. Such prohibitions are not necessary for foods that are labeled to indicate quality and that do not pose a risk when eaten past the date. These bans can result in unnecessary waste while also sending consumers the wrong message that past-date food is unsafe to eat. The prohibition on sale or donation of past-date foods that are labeled for quality conflicts with the messaging of the FMI-GMA standard, which is that food with a quality date can safely be consumed past-date, as well as with the goal of the standard, which is to reduce unnecessary food waste.

Some states include restrictions or prohibitions on past-date food sales that can coexist with the Product Code Dating Initiative, and thus, we did not count these as conflicts. In particular, 4 states restrict, but do not prohibit, the sale of food past the quality date. These states do not conflict with the Product Code Dating Initiative because they provide reasonable steps that retailers can take to sell past-date foods. For example, Washington clarifies that perishable packaged foods “can be sold after the pull date has expired if they are still wholesome, not a danger to health and clearly labeled indicating that the pull date has expired.”⁵⁴ In addition, several states, including New Hampshire, prohibit the sale of food past a discard date.⁵⁵ Such laws also are not in conflict with the Product Code Dating Initiative because they restrict sale of foods with a potential increased safety risk.

In sum, given the array of state regulations that conflict with the FMI-GMA voluntary standard, retailers and manufacturers in 27 states cannot comply with both state regulation and the FMI-GMA standard language at the same time. Despite a high rate of adoption of the voluntary standard, without federal action, date labels across the U.S will remain inconsistent, unreasonable prohibitions on sale or donation will persist, and consumers will remain confused.

b. State-level and voluntary initiatives cannot provide consistent education to consumers nationally.

Educating consumers about the meaning of date labeling phrases is vital to ensure that a standardized date labeling system actually reduces consumer confusion.⁵⁶ However, because manufacturers continue to use a variety of date labeling phrases, and these phrases have different meanings in different states, it will be difficult to effectively educate consumers. Consumers may learn that the dates mean one thing, but in another store or with products from another manufacturer that information will not be correct. Further, in the absence of federal law requiring the use of certain standard labels, federal agencies cannot guarantee the meaning of labels and thus cannot provide the necessary education about these terms. By contrast, if date labels were standardized in federal

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law, products would generally bear the correct labels, and governmental agencies would be able to provide education about the meaning of these labels. A successful consumer education campaign will need to align messaging across the public and private sectors. The promise of standardized date labels will only be achieved if the labels are standard on all products, and if the federal agencies regulating foods are able to stand behind those labels and educate consumers about their meanings.

c. Voluntary initiatives cannot achieve universal standardization because some manufacturers and retailers may choose not use the correct date labeling phrases.

Even in the absence of state law conflicts, it is unlikely that a voluntary industry standard like the Product Code Dating Initiative could fully achieve universal standardization of date labeling language. Not all retailers and manufacturers will choose to use the standard phrases in compliance with the Product Code Dating Initiative, either because they do not opt in, or because, especially in the case of smaller businesses, they are not members of FMI/GMA and do not know of the initiative. Unlike federal legislation, the Product Code Dating Initiative is voluntary and does not include any enforcement mechanism for retailers and manufacturers that do not comply. Regardless of the reason, the lack of compliance will mean consumers will continue to see inconsistent labels.

Inconsistent adoption of this voluntary standard could perpetuate and even increase consumer confusion. It could also present a food safety risk if consumers believe date labels have been standardized, when in fact they have not. For example, customers may come to rely on the separate quality (“BEST If Used By”) and discard (“USE by”) labels. But if a food company is not complying with the standard uses “BEST If Used By” even on products that have increased risk over time, a consumer could inadvertently eat a high-risk food past its safety date, thinking that it is merely past peak quality. Or a company not in compliance could accidentally increase waste by carrying “USE by” labels on all products, even those where the date is intended as a quality indicator. Without any requirement to standardize labels, issues like these will persist.

FEDERAL LEGISLATION IS NECESSARY

While a beneficial beginning, the potential of the Product Code Dating Initiative to clarify date labels across the country is significantly limited by the current system of state-level date label regulations. Federal legislation that establishes a national uniform date labeling system is necessary to cure widespread inconsistency in date labeling, alleviate the confusion that leads to waste, and prevent the prohibition of sale or donation of perfectly safe and wholesome food.⁵⁷

A. Why Federal Legislation is Necessary

Although state governments and industry actors are taking meaningful steps to address confusion, these efforts alone are not sufficient to standardize date labels across the country. Despite efforts in some states to repeal burdensome requirements and standardize date labels, inconsistent state laws remain a headache for companies and consumers alike. For manufacturers and the food industry, complying with the state laws that govern date labeling is more burdensome than complying with a single federal law would be. In the absence of federal legislation, keeping track of these variable state labeling laws and proposed new ones may become even more complicated in the months and years to come. As noted above, in the most recent legislative session alone, 11 pieces of date labeling legislation were introduced, and 5 bills passed into law.⁵⁸ Federal legislation would supersede these

inconsistent state laws, meaning that food manufacturers and retailers would be able to use the same date labels everywhere they do business.

The Product Code Dating Initiative provides a valuable model for date label standardization, as FMI, GMA, and their member companies have done the difficult work of figuring out which label language works best for industry and consumers alike. However, for all of the reasons described above, it cannot achieve universal standardization or fulfill the goals of consistent and standard date labels. The federal government can use the Product Code Dating Initiative as a template for legislation to create a comprehensive and effective national standard.

B. What Federal Legislation Should Do

Since 2016, Congress has introduced several pieces of legislation to standardize date labels.⁵⁹ To solve the issues laid out in this issue brief, Congress should build on these previous proposals. At a minimum, federal legislation should include the following elements, described in more detail below: (1) establish two standard date labeling phrases, one to indicate quality and one to indicate safety,⁶⁰ (2) prohibit state laws that ban sale of food past the quality date, and (3) provide for a national education campaign for consumers.

1. Standardize date label language

Federal legislation should require that manufacturers or retailers who choose to affix date labels on foods use one of two prescribed labels, and prohibit states from requiring any date labeling language aside from these two standard phrases. Companies should have the option of using either a quality label, discard label, or neither, but should be required to use the proper standard language if they choose to include a date label on the food. If a company chooses to use a date to communicate quality, they should be required to use the phrase “BEST If Used By.” If a company chooses to use a date to communicate when a food should be discarded for safety reasons, they should be required to use the phrase “USE By.”

The “USE By” language should only be used on high-risk, ready-to-eat foods that present risks of foodborne illness if consumed past-date, foods such as deli meats and unpasteurized cheeses.⁶¹ The list of high-risk foods could be created by FDA and USDA, as proposed in previous draft legislation,⁶² or it could be left up to companies to determine which foods merit which label, perhaps with some guidance from the agencies.

National research has shown that “Best if used by” is the phrase most easily understood by consumers as a quality indicator, and that “Use by” communicates safety.⁶³ Plus, these are the standard phrases used by the Product Code Dating Initiative. Legislation should enshrine these terms in law. Standardizing date labels in this manner will more clearly and accurately communicate the date’s meaning, distinguish safety concerns from quality concerns, and help consumers interpret date labels.

2. Allow for the sale or donation of foods after the quality date

Currently, 20 states restrict or prohibit the sale or donation of past-date food, even though the date generally is intended to indicate quality rather than safety.⁶⁴ Because foods are still safe past their peak quality date, federal legislation should bar states from prohibiting the sale or donation of food past the “BEST If Used By” date. States could still be allowed to restrict the past-date sale

or donation of foods bearing the “USE By” date labels that communicate when a food item should be discarded. Barring prohibitions on the sale or donation of wholesome food will reduce waste and set a positive example for consumers regarding the safety of food past its quality date. Further, eliminating state bans on donations of food past the quality date could increase the amount of safe food that reaches those in need.

3. Direct USDA and FDA to launch a consumer education campaign

Federal legislation should require USDA and FDA to launch a consumer education initiative to educate the public on the meaning of the two standard date label phrases required by the legislation. As trusted government agencies charged with protecting consumers, USDA and FDA are in a unique position to reduce confusion around date labels, especially if they can partner with the private sector to streamline messaging about date labels. Educating consumers about the meaning of the standard date labeling terms is essential to ensure that consumers make informed decisions about when to discard food products. Until date labels are fully standardized across all foods and until the standard labels are required in federal law, it will be difficult to launch a consumer education campaign or meaningfully change public perceptions of date labels. But once date labels are standardized nationally, education is necessary to achieve awareness and change consumer behavior. Combining standardized language with consumer education has the potential to drastically reduce the unnecessary waste of wholesome food.

CONCLUSION

Confusing, inconsistent, and opaque date labels contribute significantly to America’s food waste crisis. Existing efforts from state and industry actors are a step in the right direction, but these initiatives alone are not a comprehensive solution. Federal legislation is necessary to establish a uniform date labeling system that requires use of standard labels on all food products. A uniform federal system that clearly distinguishes between food quality and food safety will alleviate confusion, reduce food waste, and save consumer dollars, while also reducing burdens on manufacturers and retailers stemming from inconsistent state date labeling requirements. Legislators, the food industry, and consumers alike should embrace federal legislation to create uniform, standardized food date labels.

Authors

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APPENDIX: STATE-LEVEL CONFLICTS WITH THE FMI/GMA PRODUCT CODE DATING INITIATIVE

Key

1. State law requires specific label language in conflict with the Product Code Dating Initiative
2. State law requires a date label related to a manufacturer's process
3. State law requires multiple dates on a package, complicating the message to consumers
4. State law prohibits sale past a quality date⁶⁵

State	Relevant Law	Type of Conflict	
		Food	Conflict Key Number
Alabama			
Alaska	Alaska Admin. Code tit.18, §31.200 (2018).	Shellfish	1
Arizona	Ariz. Rev. Stat. Ann. § 3-701 (2018); Ariz. Rev. Stat. Ann. § 3-719 (2018).	Eggs	1
Arkansas			
California			
Colorado	8 Colo. Code Regs. § 1202-10:3.0 (2018).	Eggs	2
Connecticut	Conn. Agencies Regs. §22-133-131 (2018).	Milk/Dairy	1
Delaware	4000 Del. Admin. Code § 3-202.17 (2018).	Shellfish	1
Florida	Fla. Admin. Code Ann. r. 5K-10.003 (2018).	Milk/Dairy	4
Georgia	Ga. Comp. R. & Regs. 40-7-1-.02 (2018).	Eggs	4
Hawaii			
Idaho			
Illinois			
Indiana	370 Ind. Admin. Code 1-3-2 (2018).	Eggs	1, 2, 3
	410 Ind. Admin. Code 7-24-156 (2018).	Shellfish	1
Iowa	Iowa Admin. Code r. 21-36.8 (2018).	Eggs	2

State	Relevant Law	Type of Conflict	
		Food	Conflict Key Number
Kansas			
Kentucky	902 Ky. Admin. Regs. 50:080 (2018).	Milk/Dairy	4
Louisiana	La. Admin. Code tit. 7, pt. V § 929 (2018).	Eggs	2
Maine			
Maryland	Md. Code Regs. 10.15.06.10-11 (2018).	Milk	1, 4
Massachusetts			
Michigan	Mich. Comp. Laws Ann. § 289.8107 (2018).	Pre-packaged perishable foods	1
Minnesota	Minn. R. 1520.1900 (2018).	Eggs	2, 3
Mississippi	22-000 Miss. Code R. § 017.1.12:11 (2018).	Shellfish	1
Missouri			
Montana	Mont. Admin. R. 32.8.101 (2018); Mont. Admin. R. 32.8.202; Mont. Admin. R. 32.8.203 (2018).	Milk	1, 2, 3, 4
Nebraska			
Nevada	Nev. Admin. Code § 446.119 (2018).	Shellfish	1
New Hampshire	N.H. Code Admin. R. Agr. 14:12.04 (2018).	Prewrapped sandwiches	1
New Jersey	N.J. Admin. Code § 8:24-3.2 (2018).	Shellfish	1
	N.J. Stat. Ann. § 24:10-57.23 (2018).	Milk/Dairy	4
New Mexico	N.M. Code R. § 21.34.5.16 (2018).	Milk/Dairy	4
New York			
North Carolina	15A N.C. Admin. Code 18A.0614 (2018).	Shellfish	1
North Dakota			
Ohio			

State	Relevant Law	Type of Conflict	
		Food	Conflict Key Number
Oklahoma	Okla. Stat. tit. 2, § 10-72 (2018).	Eggs	1
Oregon			
Pennsylvania	7 Pa. Code § 59a.15 (2018).	Milk	1, 4
Rhode Island			
South Carolina			
South Dakota			
Tennessee			
Texas			
Utah			
Vermont	12-5 Vt. Code R. § 30:5-204 (2018).	Shellfish	1
Virginia	2 Va. Admin. Code § 5-531-60 (2018).	Dairy	1, 4
Washington			
Washington, D.C.			
West Virginia			
Wisconsin	Wis. Admin. Code Agric. Trade & Consumer Prot. § 88- 08 (2018).	Eggs	2, 3, 4
Wyoming	AGR FSF 3 Wyo. Code R. § 11 (2018).	Shellfish	1

ENDNOTES

- ¹ DANA GUNDERS & JONATHAN BLOOM, NAT. RES. DEF. COUNCIL, *WASTED: HOW AMERICA IS LOSING UP TO 40 PERCENT OF ITS FOOD FROM FARM TO FORK TO LANDFILL 10* (2d ed. 2017), <https://www.nrdc.org/sites/default/files/wasted-2017-report.pdf>.
- ² REFED, *A ROADMAP TO REDUCE U.S. FOOD WASTE BY 20 PERCENT 5* (2016), https://www.refed.com/downloads/ReFED_Report_2016.pdf.
- ³ *Id.* at 14.
- ⁴ Confusion over the meaning of date labels on food packaging accounts for about 20 percent of consumer food waste *Id.*.
- ⁵ See HARV. FOOD LAW & POL'Y CLINIC & NAT. RES. DEF. COUNCIL, *THE DATING GAME: HOW CONFUSING FOOD DATE LABELS LEAD TO FOOD WASTE IN AMERICA* (2013), <http://www.chlpi.org/wp-content/uploads/2013/12/datinggame-report.pdf>.
- ⁶ REFED, *supra* note 2, at 33.
- ⁷ GUNDERS & BLOOM, *supra* note 1, at 38.
- ⁸ REFED, *supra* note 2, at 33.
- ⁹ See, e.g., *id.*; GUNDERS & BLOOM, *supra* note 1, at 38.
- ¹⁰ *Grocery Industry Launches New Initiative to Reduce Consumer Confusion on Product Date Labels*, GROCERY MFR. ASS'N (Feb. 15, 2017), <http://www.gmaonline.org/news-events/newsroom/grocery-industry-launches-new-initiative-to-reduce-consumer-confusion-on-pr/>.
- ¹¹ See, e.g., AB-954, Assemb. Reg. Sess. 2017-2018 (CA 2017); H.3244, House Reg. Sess. 2017-2018 (MA 2017); S. 2420, Sen. Reg. Sess. 2018-2019 (NJ 2018).
- ¹² HARV. FOOD LAW & POL'Y CLINIC & NAT. RES. DEF. COUNCIL, *supra* note 5.
- ¹³ *Id.* at 20–21.
- ¹⁴ Except for infant formula. *Id.* at 8.
- ¹⁵ *Id.* at 12.
- ¹⁶ *Id.* at 13.
- ¹⁷ Mont. Admin. R. 32.8.202 (2018).
- ¹⁸ T Deak, *Food Technologies: Pasteurization*, in *Encyclopedia of Food Safety*, Volume 3 219, 223 (Yasmine Motarjemi, Gerald Moy, & Ewen Todd eds. 2014) (stating that HTST pasteurized milk is typically safe to consume for 2-3 weeks).
- ¹⁹ HARV. FOOD LAW & POL'Y CLINIC & NAT. RES. DEF. COUNCIL, *supra* note 5, at 17.
- ²⁰ HARV. FOOD LAW & POL'Y CLINIC, NAT'L CONSUMERS LEAGUE & JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, *CONSUMER PERCEPTIONS OF DATE LABELS: NATIONAL SURVEY 2* (2016), http://www.chlpi.org/wp-content/uploads/2013/12/Consumer-Perceptions-on-Date-Labels_May-2016.pdf; Roni A. Neff et al., *Misunderstood food date labels and reported food discards: A survey of US consumer attitudes and behaviors* 86 *WASTE MANAGEMENT* 123, 126 (2019).
- ²¹ Frank Yiannas, *New Initiatives Taking a Bite out of Food Waste*, WAL-MART (July 13, 2016), <https://blog.walmart.com/sustainability/20160713/new-initiatives-taking-a-bite-out-of-food-waste>.
- ²² GROCERY MFR. ASS'N, *supra* note 10.
- ²³ *Id.*
- ²⁴ GROCERY MFR. ASS'N, *BEST IF CLEARLY LABELED: HOW THE CONSUMER PACKAGED GOODS INDUSTRY IS REDUCING CONFUSION AND FOOD WASTE* (Dec. 2018), <https://www.gmaonline.org/file-manager/Best%20if%20Clearly%20Labeled%20FINAL%20Small%20File.pdf>.
- ²⁵ *Id.*
- ²⁶ Press Release, Consumer Goods Forum, *Companies Commit to Simplify Food Date Labels Worldwide by 2020, Reducing Food Waste* (Sep. 2017), https://www.theconsumergoodsforum.com/press_releases/companies-commit-to-simplify-food-date-labels-worldwide-by-2020-reducing-food-waste/.
- ²⁷ *Id.*
- ²⁸ *Id.*
- ²⁹ *USDA Revises Guidance on Date Labeling to Reduce Food Waste*, U.S. DEP'T OF AGRIC. (Dec. 14, 2016), <https://www.fsis.usda.gov/wps/portal/fsis/newsroom/news-releases-statements-and-transcripts/news-release-archives-by-year/archive/2016/nr-121416-01>.
- ³⁰ Letter from Frank Yiannas, Deputy Commissioner, Food Policy and Response, U.S. Food & Drug Admin., to Food Industry (May 23, 2019), <https://www.fda.gov/media/125114/download>.
- ³¹ *Winning on Reducing Food Waste Federal Interagency Strategy*, U.S. ENVTL. PROT. AGENCY (last updated Apr. 9, 2019), <https://www.epa.gov/sustainable-management-food/winning-reducing-food-waste-federal-interagency-strategy>.
- ³² AB-954, Assemb. Reg. Sess. 2017-2018 (CA 2017).
- ³³ H.3244/S.415, 2017-2018 Reg. Sess. (MA 2017).
- ³⁴ S.2420, Sen. Reg. Sess. 2018-2019 (NJ 2018).
- ³⁵ SB 2554, Sen. Reg. Sess. 2017-2018 (HI 2018).
- ³⁶ AB-954, Assemb. Reg. Sess. 2017-2018. (CA 2017)
- ³⁷ The following bills were introduced and signed into law: HB 2464, House Reg. Sess. 2018 (AZ 2018); SB 491, Sen. Reg. Sess. 2017-2018 (NH 2018); AB-954, Assemb. Reg. Sess. 2017-2018. (CA 2017); S.B. 6318, Sen. Reg. Sess. 2017-2018 (WA 2018); Save Good Food Amendment Act of 2017, B22-0072, Council Reg. Sess. 2017-2018. (Washington, D.C. 2017). The following bills were introduced but not signed into law in the 2017-18 session: SB 2554, Sen. Reg. Sess. 2017-2018 (HI 2018); H.3244/S.415, 2017-2018 Reg. Sess. (MA 2017); H.B. 272, House Reg. Sess. 2017 (MT 2017); S. 2420, Sen. Reg. Sess. 2018-2019 (NJ 2018); A.R. 37, Assemb. Reg. Sess. 2018-2019 (NJ

2018); H. 692, House Reg. Sess. 2017-2018 (PA 2017). Note that the New Jersey bills are still active, as the legislative session in that state runs from 2018-2019. Rhode Island also repealed its regulation requiring pull dates on packaged bakery products. R.I. REG. TEXT 476082 (2018); R.I. Code R. § 31-3-5 (repealed).

38 AB-954, Assemb. Reg. Sess. 2017-2018. (CA 2017).

39 SB 2554, Sen. Reg. Sess. 2017-2018 (HI 2018).

40 H.3244, House Reg. Sess. 2017-2018. (MA 2017).

41 S. 2420, Sen. Reg. Sess. 2018-2019 (NJ 2018).

42 A.R. 37, Assemb. Reg. Sess. 2018-2019 (NJ 2018).

43 HARV. FOOD LAW & POL'Y CLINIC & NAT. RES. DEF. COUNCIL, *supra* note 5, at 12.

44 See Appendix for state-specific information.

45 Most states adopt some version of the FDA Food Code for shellfish labeling laws, which requires different labels depending on the size of the container. For example, the 2013 FDA Food Code requires that raw shucked shellfish bear “[t]he “sell by” date for packages with a capacity of less than 1.89 L (one-half gallon) or the date shucked for packages with a capacity of 1.89 L (one-half gallon) or more.” In these cases, the law was considered to be in conflict for requiring “sell by” terminology for packages under one-half gallon, but not for requiring the date shucked for packages over one-half gallon, since this seems to be aimed at wholesale purchasers, rather than at consumers. U.S. DEP’T OF HEALTH & HUMAN SERVS., FOOD & DRUG ADMIN., FDA FOOD CODE 60 (2013), <https://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM374510.pdf>.

46 For more detailed information on specific conflicts, see Appendix.

47 FOOD MKTING INST. & GROCERY MFR. ASS’N, PRODUCT CODE LABELING IMPLEMENTATION GUIDE 3–4, <https://www.gmaonline.org/file-manager/2017%20Product%20Labeling%20Implementation%20Guide.pdf> (last visited Apr. 29, 2019).

48 See, e.g., ARIZ. REV. STAT. ANN. § 3-701 (2018); MD. CODE REGS. 10.15.06.10–11 (2018).

49 8 COLO. CODE REGS. §1202-10:3.0 (2017).

50 MONT. ADMIN. R. 32.8.203 (2017).

51 FOOD MKTING INST. & GROCERY MFR. ASS’N, *supra* note 47, at 4.

52 The Clinic survey identified several state regulations that require such dates for products that are not highly perishable, such as shellfish, milk, and eggs. Due to the lack of specificity in guidance from FMI-GMA, these requirements were considered to be in conflict. Wis. ADMIN. CODE AGRIC. TRADE & CONSUMER PROT. § 88.34 (2017). Although the phrase “best if use by” is one of the options for a “use by” date, which is consistent with the Product Code Dating Initiative language, the additional required pack date conflicts with the Product Code Dating Initiative.

54 WASH. ADMIN. CODE § 16-142-130 (2018).

55 N.H. CODE ADMIN. R. AGR. 1412.01 (2018).

56 See, e.g., GUNDERS & BLOOM, *supra* note 1, at 38 (recommending a national education campaign to support federally standardized date labels).

57 FDA and USDA also have the ability to standardize date labels under their authority to ensure product labels are not misleading. 21 U.S.C. § 331(b); 21 U.S.C. § 463(a); 21 U.S.C. § 607(c), (e); 21 U.S.C. § 1043; 9 C.F.R. § 317.8. Because FDA and USDA have jurisdiction over different food products—USDA has authority to regulate meat, poultry, and some egg products, while FDA has authority to regulate safety and labeling for all other food products—both agencies would need to act in coordination to ensure that labeling language is the same for all food products. Therefore, for purposes of this issue brief, we will focus on federal legislation, which would more easily standardize date labels across all food products.

58 See *supra* Part II(a).

59 See, e.g., Food Date Labeling Act, H.R. 5298, 114th Cong. (2016); Food Date Labeling Act, S. 2947, 114th Cong. (2016); Food Recovery Act, H.R. 3444, 115th Cong. (2017); Food Recovery Act, S. 1680, 115th Cong. (2017).

60 HARV. FOOD LAW & POL'Y CLINIC, NAT'L CONSUMERS LEAGUE & JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, *supra* note 20, at 2; Neff et al., *supra* note 20.

61 DATE LABEL STANDARDIZATION TOOL, REFED (2017), <https://www.refed.com/downloads/ReFED-Standardization-Package.pdf>.

62 See, e.g., Food Date Labeling Act, H.R. 5298, 114th Cong. (2016); Food Date Labeling Act, S. 2947, 114th Cong. (2016); Food Recovery Act, H.R. 3444, 115th Cong. (2017); Food Recovery Act, S. 1680, 115th Cong. (2017).

63 HARV. FOOD LAW & POL'Y CLINIC, NAT'L CONSUMERS LEAGUE & JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, *supra* note 20, at 2; Neff et al., *supra* note 20, at 127.

64 See HARV. FOOD LAW & POL'Y CLINIC & NAT. RES. DEF. COUNCIL, *supra* note 5, at 12.

65 Some states restrict, but do not prohibit, the sale or donation of food past the quality date. See, e.g., 105 MASS. CODE REGS. 500.006 (2018); MICH. COMP. LAWS ANN. § 288.539 (2018); OR. REV. STAT. § 616.825 (2018); WASH. REV. CODE ANN. § 15.002.012 (2018). These states were not considered to be in conflict with the Product Code Dating Initiative.

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