

Food's up, are you ready? New Ontario menu labelling laws coming into force on January 1, 2017

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As of January 1, 2017, the *Healthy Menu Choices Act* (the Act) will require restaurant chains and other food service providers with 20 or more locations operating under the same (or substantially the same) name in Ontario to provide calorie information for standard food and drink items on menus, labels and tags.

Overview of the legislation

The Act will have a broad application, applying not only to quick-service restaurants, but also convenience stores, grocery stores, movie theatres and other businesses that prepare meals for immediate consumption, either on the premises or elsewhere.

Once in force, persons who own or operate regulated food service premises will be required to display the number of calories of each variety, flavour and size of food and drink items that are offered with standardized portions and content. The calorie content and prescribed information must be displayed on one or more signs, on each menu where the standard food item is listed and, if the standard food item is on display, on the food's label or tag.

The Regulations under the Act (which were recently amended) clarify the requirements for caloric posting, including providing guidance on where caloric information must be posted, what constitutes a standard food item, certain prescribed statements that must be posted and possible exemptions.

Specific application to franchisors

Franchisors should be aware that the Act defines a person who owns or operates a regulated food service premise as a "person who has responsibility for and control over the activities carried on at the regulated food service premise, and may include a franchisor, a licensor, a person who owns or operates a regulated food service premise through a subsidiary and a manager of a regulated food service premise, but does not include an employee who works at a regulated food service premise but is not a manager." While the Regulations provide guidance on the obligations restaurant chains and other food service providers will have under the Act, they do not address the issue of franchisor liability for compliance by their franchisees. Accordingly, it is too early to know with certainty how the Act will be applied to franchisors. However, it appears that a franchisor's exposure to liability for compliance with the Act will likely be tied to the level of control (if any) the franchisor has over the activities carried on at the regulated food service premise.

What constitutes a “standard food item”

Caloric content must be posted for all “standard food items,” which are defined in the Act as food or drinks that are sold or offered for sale in servings that are standardized for portion and content. The Regulations further require that the standard food item must be a “restaurant-type food or drink item,” which is defined as a food or drink item that is either served in a regulated food service premise or processed and prepared primarily in a food service premise, and is intended for immediate consumption without further preparation by a consumer.

The Regulations provide for certain exemptions from what constitutes a “standard food item.” In particular, the following food or drink items are exempt from the definition of “standard food item”:

- food or drink items offered for sale for less than 90 days per calendar year (consecutively or non-consecutively)
- self-serve condiments that are available free of charge and are not listed on the menu
- food or drink items that are prepared specifically for inpatients of a hospital, private hospital or psychiatric facility, or residents of a long-term care home or retirement home
- food or drink items that are prepared on an exceptional basis, in response to a specific customer request, and that deviate from the standard food items offered by the food service premise

Where caloric information must be posted

The Act requires the caloric content of each standard food item to be posted on all menus. Under the Regulations, the definition of “menu” is broad and includes paper menus, electronic menus, menu boards, drive-through menus, online menus or menu applications, advertisements (other than billboards, radio and television advertisements) and promotional flyers. The Regulations clarify the definition of “menu” by exempting online menus, menu applications, advertisements and promotional flyers if they do not list prices for standard food items or if they do not list standard food items that a person can order for delivery or takeaway and do not provide a method to place an order.

The Regulations also specify how calorie information is to be displayed on menus, including requirements for where calories are displayed and the size, format and prominence of the display. The Regulations give additional guidance for standard food items that are intended to be shared among customers, that are available in a number of flavours, varieties or sizes, that are combination meals with two or more variable items or that are offered with the option of adding standard supplementary items such as toppings. Specific instructions are also given for food service premises that offer food or drink items that customers serve for themselves and for food service premises that serve alcohol.

The Regulations provide for certain exemptions from Section 2(2)(b) (Label and Tag Requirements) under the Act. In particular, the following items are exempt from Section 2(2)(b) (Label and Tag Requirements) of the Act:

- alcoholic beverages that are on display

- standard food items that are on display and that are labelled with a nutrition facts table that meets the requirements of the *Food and Drug Regulations* made under the *Food and Drugs Act* (Canada)
- standard food items in a vending machine

How caloric information is determined

The Regulations require that the number of calories in a standard food item be determined by either: (1) testing in a laboratory or (2) a nutrient analysis method. The person who owns or operates the regulated food service premise must reasonably believe that the method will accurately estimate the number of calories in the standard food item. As noted above, under the Act, the person who owns or operates the regulated food service premise may include a franchisor.

Requirement to post contextual statement

In addition to the posting of certain caloric and other information, the Regulations require that restaurant chains and other food service premises post a prescribed contextual statement on every menu of the premise, and, in certain circumstances, publicly on one or more signs. As of January 1, 2017, the contextual statement must state either: "The average adult requires approximately 2,000 to 2,400 calories per day; however, individual calorie needs may vary" or "Adults and youth (ages 13 and older) need an average of 2,000 calories a day, and children (ages 4 to 12) need an average of 1,500 calories a day. However, individual needs vary." As of January 1, 2018, only the latter option (i.e., "Adults and youth (ages 13 and older) need an average of 2,000 calories a day, and children (ages 4 to 12) need an average of 1,500 calories a day. However, individual needs vary") may be used. In either case, the Regulations also allow the use of a French version of the contextual statement.

Possible exemptions

The Regulations provide for certain exemptions to the application of Section 2 (Information to be Displayed) of the Act. In particular, restaurant chains and food service premises may be exempt from the obligations imposed by the Act if they operate for less than 60 days in a calendar year, or if they are located in a school, private school, correctional institution or childcare centre. In addition, the Regulations provide that persons who own or operate one or more regulated food service premises that are grocery stores are exempt from Section 2 (Information to be Displayed) of the Act in respect of the following food items sold at the grocery store: deli meats and cheeses that are normally sold by weight and that are not part of another standard food item; prepared fruit and vegetables intended for multiple persons; flavoured bread, buns and rolls that are not part of another standard food item; and olives and antipasti that are not part of another standard food item. The Regulations also provide a definition of "grocery store."

Consequences of non-compliance

Penalties for non-compliance have been set for corporations at \$5,000 for each day on which there is non-compliance for a first offence and a fine of up to \$10,000 per day for any second or subsequent offence. Liability is extended to directors and officers of a non-compliant corporation where such director or officer fails to take all reasonable care to ensure compliance with the legislation. The penalties for non-compliant individuals are set at \$500

for each day on which there is non-compliance for a first offence and up to \$1,000 per day for a second or subsequent offence.

The Act does not create a private right of action, but it also does not expressly pre-empt consumer claims grounded in misrepresentation or other tort claims, and so it remains to be seen whether the Act will herald increased litigation risk for companies operating in the food services industry.

Conclusion

The Act will have a significant impact on a number of food service providers, including fast food restaurants, convenience stores, grocery stores, bakeries and coffee shops as well as entertainment venues like movie theatres, amusement parks and bowling alleys. Food service providers and franchisors should take action now to review their systems and implement the necessary changes to ensure compliance with the Act as of January 1, 2017.