

# Legal Fact Sheet

## Maine Food Donation: Date Labeling Laws

Created by the Harvard Law School Food Law and Policy Clinic, September 2018

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.

### Federal Law on Date Labels

There currently is no federal law regulating date labels.<sup>1</sup> Congress has 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 utilized this authority 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>

In the absence of federal date labeling laws, the Food Marketing Institute (FMI) and Grocery Manufacturers Association (GMA) in 2017 launched a voluntary initiative to encourage retailers and manufacturers to only use one of two standard phrases on consumer facing food packaging: “BEST if Used By” to describe dates utilized in order to communicate freshness/quality or “USE By” for the few products that carry an increased food safety risk if consumed past a certain date.<sup>6</sup> USDA, too, has revised its data labeling guidance to encourage food manufacturers and retailers to use “best if used by” to describe a date utilized to communicate the time of peak product quality.<sup>7</sup>

### Maine 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>8</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>9</sup> Despite this fact, many consumers continue to believe date labels are related to food safety.<sup>10</sup> However, no link has been shown between eating food after its labeled date and foodborne illness.<sup>11</sup>

Maine state law requires date labels only on shellfish.<sup>12</sup> Packages of fresh or fresh frozen shellfish less than 64 fluid ounces in volume must be marked with the words “SELL BY DATE” or “BEST IF USED BY” and a date when the product is expected to reach the end of its “shelf life.”<sup>13</sup> Packages larger than 64 fluid ounces must be marked “DATE SHUCKED.”<sup>14</sup> Date labels are not otherwise required in Maine.

Maine does not restrict the donation or sale of past-date shellfish products or any other food products.

## Conclusion

In sum, because there is no federal law on date labeling, regulation of these labels has been left largely to the states. Maine requires date labels only for shellfish products, but does not prohibit the sale or donation of these or other food items past their labeled date.

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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 Sept. 21, 2017).

<sup>2</sup> 21 U.S.C.S. § 331(b) (2017); 21 U.S.C.S. § 343 (2017); 21 U.S.C.S. § 463(a) (2017); 21 U.S.C.S. § 607(c) (2017); 21 U.S.C.S. § 1043 (2017).

<sup>3</sup> *FDA Basics*, FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm210073.htm> (last updated Sept. 21, 2017); 21 C.F.R. § 107.20 (2017).

<sup>4</sup> See U.S. DEP'T OF AGRIC. FOOD SAFETY & INSPECTION SERV., *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) (2017).

<sup>6</sup> See *Grocery Industry Launches New Initiative to Reduce Consumer Confusion on Product Date Labels*, GROCERY MANUFACTURERS ASSOC. (Feb. 15, 2017), <http://www.gmaonline.org/news-events/newsroom/grocery-industry-launches-new-initiative-to-reduce-consumer-confusion-on-pr/>.

<sup>7</sup> See Press Release, Food Safety & Inspection Serv., U.S. Dep't of Agric., *USDA Revises Guidance on Date Labeling to Reduce Food Waste* (Dec. 14, 2016), <https://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating>.

<sup>8</sup> HARVARD FOOD LAW & POLICY CLINIC AND NAT'L RES. DEF. COUNCIL, *supra* note 4, at 14.

<sup>9</sup> See *id.* at 17.

<sup>10</sup> *Id.* at 19.

<sup>11</sup> See *id.* at 19–20.

<sup>12</sup> These requirements were previously codified at 13-188 Me. Code R. § 15.21. However, effective August 21, 2018, that section was repealed, and Maine instead passed a regulation adopting the National Shellfish Sanitation Program Model Ordinance titled "Guide for the Control of Molluscan Shellfish." See ME ADC 13-188 Ch. 94, s 94.01. The date labeling requirements for shellfish in the Model Ordinance are consistent with those required under the previous law, and therefore the requirements remain substantively unchanged. See National Shellfish Sanitation Program (NSSP) Guide for the Control of Molluscan Shellfish: 2015 Revision Section II, Chapter X (06), U.S. Food and Drug Administration and Interstate Shellfish Sanitation Conference, <https://www.fda.gov/downloads/Food/GuidanceRegulation/FederalStateFoodPrograms/UCM505093.pdf>.

<sup>13</sup> See ME ADC 13-188 Ch. 94, s 94.01; National Shellfish Sanitation Program (NSSP) Guide for the Control of Molluscan Shellfish: 2015 Revision Section II, Chapter X (06), U.S. Food and Drug Administration and Interstate Shellfish Sanitation Conference, <https://www.fda.gov/downloads/Food/GuidanceRegulation/FederalStateFoodPrograms/UCM505093.pdf>.

<sup>14</sup> See ME ADC 13-188 Ch. 94, s 94.01; National Shellfish Sanitation Program (NSSP) Guide for the Control of Molluscan Shellfish: 2015 Revision Section II, Chapter X (06), U.S. Food and Drug Administration and Interstate Shellfish Sanitation Conference, <https://www.fda.gov/downloads/Food/GuidanceRegulation/FederalStateFoodPrograms/UCM505093.pdf>.