What’s cooking? New Ontario menu labelling law

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On Tuesday, May 26, 2015, Members of Provincial Parliament from all three parties voted to pass Ontario’s Making Healthy Choices Act, 2015, which will enact the Healthy Menu Choices Act, 2015 (the Act). The Act will come into force on January 1, 2017. Restaurant chains and other food service providers with 20 or more locations operating under the same (or substantially the same) name in Ontario will need to make changes to the information they display on menus, menu boards and displays regarding standard food and drink items. The Act will have broad application, applying not only to quick service restaurants, but also to convenience stores, grocery stores, movie theatres or other businesses that prepare meals for immediate consumption, either on the premises or elsewhere.

OVERVIEW OF THE LEGISLATION

Once in force, the Act will require the display of 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.

On March 19, 2016, following a lengthy consultation period, the Ontario government published Ontario Regulation 50/16 under the Act (the Regulations). The Regulations are aimed at clarifying 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. The Regulations are based on consultations the Ministry of Health and Long-Term Care undertook with key partners in the summer of 2015 as well as additional public comment the Ministry sought on draft regulations that were published in September 2015.

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 Act, the definition of “menu” is broad and includes drive-through menus, online menus, 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 available for delivery or takeout.

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, 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.

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...
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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 one or more signs at every regulated food service premise that contain the following information: “The average adult requires approximately 2,000 to 2,400 calories per day; however, individual calorie needs may vary.” Where the standard food items are targeted at children, the following alternative information may appear in place of the above statement: “The average child aged 4 to 8 years old requires approximately 1,200 to 1,400 calories per day, and the average child aged 9 to 13 years old requires approximately 1,400 to 2,000 calories per day; however, individual calorie needs may vary.”

At least one sign must be posted so that it is readily visible by, and legible to, any individual in the regulated food service premise where he or she can order food and drink or serve it to himself or herself. Restaurant chains and other food service premises can be exempted from this requirement if the contextual statement appears on every menu of the premise according to the following rules:

- Where a menu is composed of multiple pages, the information must appear in such a way that the information is visible when the menu is opened to any page listing a standard food item.
- The information must appear in a place on the menu or page of the menu that is in close proximity to the standard food items listed on the menu or page.
- The information must appear in the same font and format as, and in at least the same size and prominence as, the name or price of the standard food items listed on the menu or page.

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.

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.

FEDERAL REQUIREMENTS

Prepackaged foods sold in Canada are already subject to specific mandatory nutrition labelling requirements, including calorie content declarations, in the Nutrition Facts Table. However, most foods
sold in restaurants and food service establishments are exempt, as are foods ordered for take-out and delivery. Although nutrient content claims for foods are permitted for use in restaurants (i.e., on menu boards, menus, promotional material), the Canadian Food Inspection Agency requires that such claims must generally meet the requirements applicable to most prepackaged foods as set out under the Food and Drug Regulations. The Act, therefore, will result in many regulated food service premise owners and operators having to now also comply with federal requirements.

Specifically, all of the nutrients, vitamins/minerals and the energy values listed must be declared per serving of stated size. This means the information must be shown per portion served to the customer. Further, all nutrient declarations must be shown in the prescribed units (i.e., fat content in grams). In some cases, including a declaration of the percent daily value (%DV) of a nutrient is acceptable, provided that such declaration is in addition to the declaration of the nutrient in the prescribed unit. In addition, the declaration may not be modified or qualified by other words (e.g., “contains” 6 grams of fat is not permissible).

While it remains to be seen how the Canadian Food Inspection Agency will react to the requirements under the Act and Regulations, regulated food service premise owners and operators will likely need to ensure both Ontario and federal requirements are being met. It is worth noting, however, that the Regulations do expressly contemplate the Food and Drug Regulations. In particular, the Regulations provide for an exemption from the requirements in Section 2 (2) (b) of the Act (Information to be Displayed) with respect to 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).

SIMILAR INITIATIVES IN CANADA AND THE UNITED STATES

The Act follows from an announcement on October 9, 2013 that the Ontario government would begin consultations regarding the introduction of legislation that would require large chain restaurants to place caloric and other nutritional information on their menus and menu boards, and reflects a growing trend in food regulation requiring food service providers to present consumers with health information about their dietary choices. In 2010, the U.S. Congress passed a law requiring chain restaurants with 20 or more locations in the United States to provide calorie disclosure on menus and menu boards. The regulations were initially expected to be finalized and take effect in 2012; however, following a long debate in Congress, the U.S. Food and Drug Administration issued the final rules on November 25, 2014. In 2011, the Province of British Columbia introduced the Informed Dining Program, a voluntary nutrition information program for restaurants. Under the Informed Dining Program, participating restaurants provide their guests with easily accessible and understandable nutrition information for all standard menu items.

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 develop an action plan for compliance with the Act and the Regulations.
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The Act will have a significant impact on a number of food service providers, including fast food restaurants.

CONCLUSION

In addition to the posting of certain caloric and other information, the Regulations require that the number of calories in a standard food item be determined by either: (1) a method of analysis of the food item in a laboratory or (2) a nutrient analysis method. The person who owns or operates the regulated food service premise where he or she can order food and drink or serve it to himself or herself.

POSSIBLE EXEMPTIONS

Franchisors should be aware that the Act defines a person who owns or operates a regulated food service premise that contains the following information: “The average adult requires approximately 2,000 to 2,500 calories a day for healthy eating.”

REQUIREMENT TO POST CONTEXTUAL STATEMENT

The Regulations require that the number of calories in a standard food item be determined by either: (1) a method of analysis of the food item in a laboratory or (2) a nutrient analysis method. The person who owns or operates the regulated food service premise.

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CONSEQUENCES OF NON-COMPLIANCE

While it remains to be seen how the Canadian Food Inspection Agency will react to the requirements, there may be non-compliance for a first offence and a fine of up to $10,000 per day for any second or subsequent offence.

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