

Update

What's Cooking? New Ontario Menu Labelling Law to Take Effect in 2017

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* (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 convenience stores, grocery stores, movie theaters or other businesses that prepare meals for immediate consumption, either on the premises or elsewhere. We previously wrote about the requirements and potential impacts of the Act in an [Osler Update](#) in December 2014.

Specific Application to Franchisors

In its original version, the then proposed Act specifically included franchisors in the definition of a "person who owns or operates a regulated food service premise." The manner in which the definition was originally drafted created some uncertainty in the franchise industry regarding whether the inclusion of "franchisor" in the definition could mean that both the franchisor and its franchisee(s) could be found liable for a franchisee's failure to comply with the Act.

At the committee stage, the Act was amended to provide that a person who owns or operates a regulated food service premise means 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 it is too early to know with certainty how this definition will be interpreted, 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) it has over the activities carried on at the regulated food service premise.

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.

Information to be Displayed

The Act requires 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 and any “other information” required by the regulations with respect to such food and drink items. 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 information must be specific to each variety, flavour and size offered.

The Ontario government has yet to introduce draft regulations implementing the Act, so the scope of what “other information” will need to be displayed remains to be seen. It is possible, however, that the Ontario government may look to the recently finalized U.S. Food and Drug Administration Rule Regarding Nutrition Labeling (the FDA Rule) for guidance. Like the Act, the FDA Rule requires regulated establishments to list calorie information for each standard menu item on menus and menu boards; however, the FDA Rule then goes further by requiring that establishments include a succinct statement about total suggested daily caloric intake. Further, the FDA Rule requires other nutritional information such as total calories, calories from fat, total fat, saturated fat, trans fat, cholesterol, sodium, total carbohydrates, fiber, sugars and protein must also be made available in writing upon request. Finally, under the FDA Rule regulated establishments are required to post a statement on menus and menu boards indicating that the written nutrition information is available for customers to review.

Businesses subject to the Act in Canada and the FDA Rule in the United States will need to pay particular attention to subtle nuances and variations between the two regimes to ensure compliance. In addition, prepackaged foods sold in Canada are already subject

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to specific mandatory nutrition labelling requirements, including calorie content declarations, in the Nutrition Facts Table. Accordingly, affected Canadian businesses will need to ensure both Ontario and federal requirements are being met.

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