

## BREAKFAST SANDWICHES

	Price
SMOKED SALMON WASABI on Onion Dill Bagel (430 CAL)	3.99
BACON, EGG & CHEDDAR MELT on Ciabatta (500 CAL)	3.89
SAUSAGE, EGG & CHEDDAR MELT on Asiago Bagel (810 CAL)	3.89
PROSCIUTTO & EGG on Asiago Bagel (530 CAL)	3.89
PORTOBELLO, EGG & CHEDDAR on Ciabatta (490 CAL)	3.59
SPINACH & CHEESE CROISSANT (290 CAL)	3.19
HAM & CHEESE CROISSANT (400 CAL)	3.19

### CREATE YOUR OWN BREAKFAST EGG SANDWICH BREAD

Bagel, Ciabatta or Croissant (180-410 CAL)	2.99
CHEESE	
Cheddar or Swiss (150-160 CAL)	3.29
MEAT	
Choice of Bacon, Ham, or Sausage (80-210 CAL)	3.29
CHEESE & MEAT (230-370 CAL)	3.89

## BAGELS

BAGEL (280-410 CAL)	1.09
BAGEL WITH CREAM CHEESE (add 120-180 CAL)	2.18
DOZEN	8.99
HALF DOZEN	4.99

## HEALTHY OPTIONS



# What Can States and Local Governments Do About Menu Labeling?

*Federal law preempts most, but not all, state and local menu labeling laws and regulations. This fact sheet provides information about what regulatory options remain for state and local governments.*

As required by the Affordable Care Act, the FDA has finalized and published a federal menu labeling rule, which took effect on May 7, 2018.<sup>1</sup> It requires calorie count information to be posted on menus at certain chain restaurants and other venues across the country. The rule provides consumers with more nutrition information about their food choices at restaurants that have 20 or more outlets nationally, as well in settings such as sports arenas and movie theaters.

Federal law preempts most, but not all, state and local menu labeling laws and regulations. This fact sheet provides information about what regulatory options remain for state and local governments. The information in this fact sheet pertains to the federal rule that addresses menu labeling in restaurants and similar retail food establishments. It does not pertain to the federal rule that addresses similar labeling requirements for vending machines.



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Law & policy innovation  
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### 1. What can state and local governments still do about menu labeling?

The federal rule sets uniform national standards for menu labeling at chain restaurants and certain other retail food establishments with 20 or more locations. For these establishments, federal standards preempt most state and local menu labeling laws.

Even so, states and localities can act to make sure that restaurants and similar food sellers provide clear, accurate, and comprehensive nutrition information to their customers. First, they can pass and then enforce a state or local law that includes requirements identical to those in the federal rule. Second, they can enact and enforce a law that imposes requirements on restaurants or other food establishments that are not covered by the federal rule. Finally, they can enact requirements that are outside the scope of the federal menu labeling rule, or are exempted from preemption, but for a law to avoid preemption through these channels it must be very carefully crafted. For more information about the exemptions, please contact us.

### 2. What does it mean for state or local standards to be "identical" to the federal law?

A state or local law would be identical if it does not require restaurants or other businesses covered by the federal rule to do anything more, or anything different, than what that rule requires. For example, the federal rule requires restaurants to post a specific statement about how many calories a person should consume in a day.

Therefore, a local law would not be identical if it required those same restaurants to post a different (or additional) statement. But states and cities can require restaurants to post the statement that's required by the federal rule. And they can require restaurants to post calorie information on menu boards in the way outlined by the federal rule.

### 3. Why would a state or city want to enact a law that's identical to federal law?

States or localities might want to ensure that the federal rule is enforced, and they may wish to enforce it in their own way. For example, a state may already have a code enforcement program that can seamlessly incorporate an additional item to monitor, such as whether calorie information is listed for menu items at certain restaurants. If this is the case, then the state could pass a menu labeling law that would be relatively easy to enforce. The state could then impose its own *penalties* for violations, so long as the actual menu labeling *requirements* (eg, what has to be posted, where, and in what way) remain identical to those of the federal rule. The state could probably also impose a fee to cover the costs of enforcement (if such a fee is permitted by state law).

In the absence of a state or local menu labeling law, it is not clear how the new federal rule will be enforced. Enforcement seems likely to follow much the same pattern of delegated responsibility that the Food & Drug Administration (FDA) currently uses for food safety inspection at food processing facilities.



#### 4. How else can states or localities ensure the federal menu labeling law is enforced?

There are also at least two alternatives to enacting a state or local law: (1) a state or locality can arrange with the FDA to enforce the federal rule on the FDA's behalf (this is often done in the case of food safety inspection, for example)<sup>2</sup>; or (2) a state (but not a locality) can enforce the Food Drug & Cosmetic (FD&C) Act on its *own* behalf (this is something states have done much less frequently).<sup>3</sup> In either of these cases, the state would be seeking penalties for violations under the FD&C Act, rather than under its own state law.

Here is what the FDA has said in response to the question of who will enforce the federal rule:

“[There are] three mechanisms by which States (and, in some cases, local jurisdictions) could have a role in enforcing the provisions of section 403(q)(5)(H) of the FD&C Act and this rule:

1. In general, a State or political subdivision of a State may establish food nutrition labeling requirements that are identical to applicable Federal requirements, including the requirements of this rule. In this case, the State or local jurisdiction would act on its own behalf to enforce its own requirements, albeit requirements that are identical to the Federal requirements.
2. Under the FD&C Act, . . . FDA is authorized to conduct examinations and investigations for the purposes of the FD&C Act through any health, food, or drug officer or employee of any State, Territory, or political subdivision thereof (such as a locality), duly commissioned to act on behalf of FDA. In this case, the State or local representative would act on our behalf to enforce the Federal requirements.
3. In general, under . . . the FD&C Act . . . , a State may bring in its own name and within its jurisdiction proceedings for the civil enforcement, or to restrain violations, of . . . the nutrition labeling requirements for standard menu items . . . , if the food that is the subject of the proceedings is located in the State provided that other requirements and conditions are met. In this case, the State acts on its own behalf to enforce the Federal requirements.

We have successfully partnered with States to conduct examinations and inspections in other contexts, including inspections of food processing facilities on our behalf. We expect to continue to cooperatively leverage the resources of Federal, State, and local Government Agencies as we strive to obtain industry-wide compliance with this rule.<sup>4</sup>



#### 5. Can states and localities enact menu labeling laws or regulations with requirements that differ from federal law?

States and localities can pass menu labeling laws or regulations with different requirements, so long as they apply only to establishments not covered by the federal rule or, in limited circumstances, impose requirements that fall outside the preemptive scope of the rule or fall into a limited set of exceptions to preemption. The federal rule applies to restaurant chains and other food establishments (including those in grocery and convenience stores, movie theaters, bowling alleys, amusement parks, and sporting venues) that have 20 or more outlets. So if a state or locality would like to require chains with, for example, 10 or more outlets to post nutrition information on menus, it could pass a law that applies to restaurants with 10-19 outlets. Then that category of restaurants would be subject only to the state or local law, not to the federal rule. In these instances, the state or local law could impose standards that are different from those required by the federal rule – for example, by requiring sugar counts to be placed on menu boards, in addition to calorie information.

However, *any restaurant or other food establishment not subject to the federal rule can choose to be covered by its provisions voluntarily*. If it does so, it will be subject only to the federal rule's requirements, not to any state or local law requirements, even if those requirements are more stringent.

### 6. What if a state or local government has a different menu labeling law in place?

The federal rule preempts state and local menu labeling laws that apply to the same restaurants but don't have identical requirements, even if those local laws predated the federal rule. For example, if a city has an ordinance that requires all restaurants to post sugar content, in addition to calorie information, on menu boards, that requirement can no longer be enforced at restaurants where the federal rule applies (ie, those with 20 or more outlets).<sup>5</sup> The city can still enforce requirements identical to those in the federal law, and/or it can pass a new law that requires restaurants with fewer than 20 outlets to post information about sugar content.

For more information, please [contact ChangeLab Solutions](#).

### Endnotes

1. Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants, 79 Fed. Reg. 71156 (2014) (codified at 21 C.F.R. 101.11). See also 21 U.S.C. § 343(q)(5)(H) (2010) (requiring nutrition labeling in certain restaurants and food service establishments).
2. See 21 U.S.C. 372(a)(1)(A) (authorizing the FDA "to conduct examinations and investigations through any health, food, or drug officer or employee of any State, Territory, or political subdivision thereof (such as a locality), duly commissioned" to act on behalf of FDA).
3. See 21 U.S.C. 337(b) (permitting a State to enforce the nutrition labeling requirements for standard menu items).
4. 79 Fed. Reg. 71156, 71244 (2014), available at [www.federalregister.gov/articles/2014/12/01/2014-27833/food-labeling-nutrition-labeling-of-standard-menu-items-in-restaurants-and-similar-retail-food](http://www.federalregister.gov/articles/2014/12/01/2014-27833/food-labeling-nutrition-labeling-of-standard-menu-items-in-restaurants-and-similar-retail-food).
5. In theory, it is possible for a state or local government to get permission for a variance from the Food and Drug Administration (FDA), but the FDA has never granted one of these requests. 21 U.S.C. § 343-1(b) (2010).

*ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information in this document does not constitute legal advice or legal representation.*

*For legal advice, readers should consult a lawyer in their state.*

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