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How Menu Labeling Could Lead To A Preemption Dilemma

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Law360, New York (July 7, 2017, 9:46 AM EDT) -- In May, the U.S. Food and Drug Administration announced the postponement of the compliance date of a federal menu labeling rule for a year, from May 2017 until May 2018.[1] Just weeks later, New York City took matters into its own hands and announced plans to begin enforcing its own updated local menu labeling rule.[2] These two actions potentially raise novel and significant issues of federal preemption.

More specifically the city's planned enforcement measures could well be in conflict with an express federal preemption clause at 21 U.S.C. § 343-1, which states that "no State or political subdivision of a State may directly or indirectly establish ... any requirement for nutrition labeling of food that is not identical to the requirement of section 343 (q) of this title [which contains restaurant menu labeling requirements]."

Federal preemption is the doctrine that federal law "preempts" state law when the laws are in conflict. It is based on the supremacy clause in Article VI of the U.S. Constitution, which states that federal law is the "supreme law of the land." The supremacy clause is understood as meaning that the Constitution and federal laws govern where they apply, irrespective of a state law. However, in the absence of federal law or where federal law does not apply, the state law still governs. Here, the preemption clause at 21 U.S.C. § 343-1 makes clear that there are federal laws regarding "requirement[s] for nutrition labeling of food" and that such laws supersede state laws attempting to govern the same.

On its face, the NYC menu labeling requirements differ in at least some material respects from those specified in the federal rule. For example, the city's rule affects food service establishments that are part of chains with 15 or more locations in the U.S., whereas the federal rule applies to chains with 20 or more locations. But more fundamentally, NYC will quite arguably be enforcing rules that Congress has determined should fall within the exclusive province of the FDA.

NYC was the first jurisdiction to require calorie labeling disclosures in covered facilities when it promulgated its original menu labeling rule in 2008.[3] In 2015 the city updated its rule to the current version.[4] In late 2014, the FDA issued a final federal rule on menu labeling, which originally required compliance with the federal rule by December 2015.[5] NYC consequently delayed enforcement of its

own menu labeling requirements in anticipation of the federal rule's impending compliance date.[6]

The compliance date for the federal menu labeling rule has been repeatedly delayed — first to December 2016, then to May 2017, and now to May 2018. In its preamble to the interim final rule providing the extension, issued only days before the pending effective date, the FDA stated, "[W]e are taking this action to enable us to consider how we might further reduce the regulatory burden or increase flexibility while continuing to achieve our regulatory objectives, in keeping with the Administration's policies."[7]

In this same document, the FDA also expressed some substantive concerns with the current iteration of the federal menu labeling requirements. The agency stated that "critical implementation issues, including some related to scope, may not have been fully understood and the agency does not want to proceed if we do not have all of the relevant facts on these matters." The FDA also stated that it has continued to receive questions about calorie disclosure signage for self-service foods, such as buffets and grab-and-go foods. These and other issues are now subject to another round of public comment, thereby placing not just the effective date of the rule into question, but its underlying substance as well.

Presumably in response to the FDA's announcement of another delay, NYC has decided to enforce its updated menu labeling rules, thereby raising the preemption dilemma. The issue could now arise in the context of either an affirmative challenge to the NYC law or a defense to any NYC enforcement action. In any such dispute the particulars of the FDA's recent announcement would appear to be an important variable, for in announcing its delay, the FDA did not couple it with an affirmation of the pending status quo. To the contrary, it brought many of the rule's particulars, and perhaps its core validity as well, into public question.

This raises the more general question on the ongoing viability of what might be termed passive federal preemption. Can, as a general proposition, the FDA or any other federal agency rely upon a congressional mandate to preclude state action (or in this case, city action), and then fail to impose corresponding obligations of its own? Can the delay of such an action go on indefinitely? Certain stakeholders have already responded in the negative. On June 7, 2017, the Center for Science in the Public Interest and the National Consumers League filed a complaint challenging the FDA's interim rule delaying the compliance deadline of the final menu labeling rule.[8] The plaintiffs allege in their complaint that the delay — made without notice-and-comment rulemaking — constitutes an unlawful amendment to the federal rule in violation of the Administrative Procedure Act, as the delay is a final agency action with legally binding effect. Given the pendency of other issues such as GMO disclosure where some of these same questions may arise, this is an issue of no small consequence to the food industry.

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[1] Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments, 82 Fed. Reg. 20825 (May 4, 2017) (Interim Final Rule Extending Compliance Date).

[2] See Press Release, de Blasio Administration Announces New Calorie Labeling Rules (May 18, 2017) (de Blasio Press Release). The NYC Departments of Health and Consumer Affairs will initially enforce the city's menu labeling rule by educating businesses during regular inspections. Starting on Aug. 21, 2017, the agencies will begin issuing notices of violation that are subject to fines.

[3] de Blasio Press Release.

[4] Id.

[5] Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 79 Fed. Reg. 71155, 71156 (Dec. 1, 2014).

[6] de Blasio Press Release.

[7] Interim Final Rule Extending Compliance Date.

[8] Complaint, Center for Science in the Public Interest, et al v. U.S. Food & Drug Admin et al, No. 1:17-cv-01085 (D.D.C. June 6, 2017).
