

MEMORANDUM

From: Martin J. Hahn
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Date: May 19, 2016

Re: Vermont AG Updates Memorandum on Enforcement of GE Labeling Law

The Vermont Attorney General's (AG's) office recently issued an update to its memorandum on its enforcement priorities for the Vermont law requiring labeling of foods produced with genetic engineering (GE). ^{1/} The updated memo explains that the 2016 Vermont budget included a provision delaying the ability of a consumer to bring a private right of action to enforce the GE labeling law until July 1, 2017. The memo also explains that Vermont is broadening the 30-day "corrective action period" for retailers to apply to manufacturers as well. Separately, in guidance, Vermont has revised its interpretation of the compliance date, so that it now applies to the date a product is introduced into commerce, providing companies with significant more flexibility if they are labeling products consistent with the Vermont law prior to July 1, 2016.

In the following memorandum, we provide our assessment of these developments.

Background

The Vermont GE labeling law goes into effect July 1, 2016 for products that are "distributed" after that date. In the absence of a federal court ruling or congressional action that would stay or preempt the Vermont law, it is set to take effect this July.

The statute, Vermont Act 120, states that existing consumer rights and remedies under Vermont law remain intact. ^{2/} Existing consumer protection laws in Vermont prohibit "deceptive acts or practices in commerce" ^{3/} and state that "Violation of a rule or regulation as made by the Attorney General is prima facie proof of the commission of an unfair or deceptive act in commerce." ^{4/} The Vermont GE labeling law is a rule or regulation made by the AG, so we suspect the Vermont courts would conclude violation of the law could be used as a basis for a lawsuit alleging that a company has committed an unfair or deceptive act in commerce.

^{1/} Memorandum from Attorney General William H. Sorrell, *Updated AGO Enforcement Priorities for Act 120 (GE Food Labeling Law)*, May 16, 2016, available at <http://www.agv.vermont.gov/assets/files/Consumer/GE-Food/AGO%20GE%20Food%20Labeling%20Law%20Enforcement%20Priorities%20Memo.pdf>.

^{2/} Vermont Statutes Annotated, Title 9, Chapter 82A, § 3048 ("Consumers shall have the same rights and remedies as provided under subchapter 1 of chapter 63 of this title").

^{3/} 9 V.S.A. § 2453(a).

^{4/} *Id.* § 2453(d).

Moreover, Vermont law provides a private right of action allowing a consumer to bring suit alleging a violation of a consumer protection rule 5/ and to seek damages, reasonable attorney's fees, and exemplary damages of no more than "three times the value of the consideration given by the consumer." 6/ Importantly, a Vermont consumer would not be eligible for the \$1,000 per product, per day penalty that the Vermont AG's office can seek for violations of the GE labeling law.

Vermont had previously explained in its regulations that it was providing a "safe harbor period" between July 1, 2016 and January 1, 2017, during which time it would be "presumed" that a product on Vermont retail shelves had been distributed before July 1, 2016 and was not required to be labeled. 7/ The regulations made clear, however, that if there was evidence that the food was distributed on or after July 1, 2016, the manufacturer would still be liable. The safe harbor provision did not address the ability of a Vermont consumer to bring a suit between July and January.

Vermont Legislative Change

The May 2016 Vermont budget, which was passed by the Vermont House and Senate, included the following language.

Sec. E.204 PRIVATE CAUSE OF ACTION; EXTENSION OF DATE

(a) Notwithstanding 9 V.S.A. § 3048(b), a consumer may not, prior to July 1, 2017, bring a private cause of action under 9 V.S.A. chapter 63, subchapter 1, for a violation of the requirements of 9 V.S.A. chapter 82A.

This language clarifies that a consumer may not bring a private right of action until July 1, 2017. The language does not address whether the private rights of action are limited to those that occur after July 1, 2017, or whether a consumer could bring a violation after July 1, 2017 for violations that occurred between July 1, 2016 and June 30, 2017.

Vermont Memo on Enforcement Priorities

The Vermont AG's office has issued a memo on its enforcement priorities that explains the safe harbor provision. The memo reiterates that during the six-month safe harbor period, Vermont will not bring an enforcement action or seek fines "unless there is evidence that a manufacturer distributed a mislabeled product after July 1, 2016." There is no discussion of what such evidence might look like.

The memo states that after January 1, 2017, "all products must be properly labeled regardless of when they were distributed." In theory, this would mean that a product distributed before July 1, 2016 – before the law's compliance date – and still on shelves after January 1, 2017, could be viewed as non-compliant if not labeled. The AG's office states, however, that it will exercise enforcement discretion and will focus on "willful violations" of the law, meaning that even after July 1, 2017, it does not expect to bring enforcement cases "based solely on a company's failure to remove improperly labeled products that were distributed before July 1, 2016."

The memo also notes the recent legislative amendment discussed above, stating that a consumer may not bring a private right of action to enforce Vermont's labeling law before July 1, 2017.

Lastly, the memo expands the 30-day "corrective action" period that currently exists in the regulations only for retailers, so that it also applies to manufacturers. 8/ It will only apply to

5/ *Id.* § 2461(b).

6/ *Id.*

7/ Vermont Consumer Protection (CP) Rule § 121.04(e).

8/ CP Rule § 121.04(c)(ii).

manufacturers, however, until June 30, 2017. After June 30, 2017, there is presumably no period provided to correct an alleged violation. The corrective action procedure will work as follows. Upon receiving a written complaint asserting that a food offered for retail sale in Vermont is not properly labeled, the AG will provide the manufacturer with a notice of the alleged violation and a copy of the complaint. No enforcement action will be commenced “unless the manufacturer continues to be in violation of the law 30 business days after the date of the notice.”

Clarification on Effective Date as Introduction into Commerce Rather than Shipment into Vermont

Based on previous guidance from the state, we expressed a concern Vermont was interpreting the law as applying to the date Vermont retailers received food products rather than the date companies introduced the products into commerce. Under that interpretation, companies that had been labeling products consistent with the Vermont requirements prior to July 1, 2016 could still have been considered out of compliance if distributors sent into Vermont earlier manufactured products without the Vermont-required label statement.

Vermont’s current guidance – which was updated May 17, 2016 – now states that “‘distributed’ means sold or transported to an entity other than the manufacturer (including the retailer, wholesaler or distributor) whether or not the food is offered for retail sale immediately thereafter.” The language suggests the distribution date should be the date the product is first introduced into interstate commerce. The revised interpretation provides much greater certainty for manufacturers. While a manufacturer may not know the date on which its products are shipped into Vermont from a distributor location, it will have control over the date the product is sold or transported to another entity, such as a distributor. We view this change of position by the Vermont AG’s office as a very positive development.

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Please contact us if you have any questions or if we can be of assistance.