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The Complex Labeling Landscape for Plant-Based Meat Alternatives

With the rise of plant-based alternatives to conventional meat products, the industry has come under scrutiny from government regulators, both in the United States and abroad. In 2019 alone, nearly 30 states considered legislation limiting the ability of plant-based protein producers to label their goods with terms associated with animal meat, such as sausage, burger, and bacon. Given the evolving regulatory frameworks in many states, producers of plant-based meat alternatives must stay abreast of these changes and consult with legal counsel to ensure continued compliance in an ever-shifting legal landscape.

TABLE OF CONTENTS

Introduction	1
Plant-Based Meat Alternatives: A Growing Industry	1
Emerging “Truth in Labeling” Legislation	1
What Are the Risks of Violating These Statutes?	1
Ongoing Litigation and Federal Inaction	2
International Regulation on Food Labeling	2
Key Takeaways	3
Lawyer Contacts	3
Endnotes	3

INTRODUCTION

Many states across the nation are passing new truth-in-labeling laws governing the labeling of plant-based meat alternatives. While some state regulations target emerging industries like cell-based meat, others expressly regulate the labeling of plant-based protein products such as “veggie burgers.” Although these statutes are not currently being enforced, that situation is likely to change as new states pass legislation, existing regulations come into effect, and pending litigation is resolved.

The current regulatory landscape for the labeling of plant-based meat products remains volatile. The lack of regulation at the federal level has left a vacuum that is being filled with inconsistent state regulation. Pending litigation in the federal courts, however, puts the future of these statutes in jeopardy. International law, too, provides another layer of regulation.

In light of the evolving nature of state regulations, and potential new federal regulation, it is important that manufacturers of plant-based meat products continue to monitor regulations to ensure continued compliance.

PLANT-BASED MEAT ALTERNATIVES: A GROWING INDUSTRY

It has been a watershed year for plant-based meat products. Since its initial public offering in May, Beyond Meat’s stock has surged by as much as 800%.¹ High-profile partnerships with industry giants such as Whole Foods and Burger King have helped elevate the already booming demand for plant-based meat alternatives,² with Barclays estimating that the market could grow from \$14 billion to more than \$140 billion over the next decade.³ This success has spurred major meat processors to diversify their conventional animal protein portfolios by investing in emerging leaders in meat-like products and by creating their own animal-free product lines.⁴

EMERGING “TRUTH IN LABELING” LEGISLATION

The rise in the popularity of meat-like alternative foods has brought with it a corresponding increase in labeling regulations for such products. The U.S. Food and Drug Administration

(“FDA”) does not currently have any specific regulations concerning the labeling of plant-based meat alternatives, beyond its general prohibition against false or misleading representations. In 2019, however, nearly 30 states proposed legislation aimed at curtailing the use of terms such as “burger,” “hot dog,” and “sausage” to describe products not derived from slaughtered animal meat.⁵ For example, Arkansas and Louisiana recently enacted legislation that expressly prohibits plant-based meat alternatives from using terms like “burger” or “sausage” on their labels.⁶

Proponents of these statutes argue that they are necessary to protect consumers. For example, Nebraska State Senator Carol Blood argues that labeling plant-based products with terms like “Beyond Meat” may lead consumers to believe that the product actually contains animal flesh.⁷ Moreover, proponents argue that descriptors such as “veggie burger” and “plant-based” create a misleading impression that a “veggie burger” is healthier than its meat counterpart.⁸ Opponents, however, argue that no one believes that a product labeled “vegan sausage” is made from real meat, and that the use of a term like “sausage” is necessary for consumers to understand the intended use and flavor profile that a plant-based product is designed to mimic.⁹

WHAT ARE THE RISKS OF VIOLATING THESE STATUTES?

For businesses operating across state borders, each statute and regulatory enforcement regime must be carefully analyzed to determine its unique labeling requirements. For example, although Missouri and Mississippi’s labeling laws seem to broadly prohibit companies from using terms like “veggie burgers” or “vegan bacon,” both states have clarified that they will not enforce their statutes against producers of plant-based meat alternatives as long as a label clearly indicates that the product does not contain animal meat.¹⁰ Similarly, Oklahoma’s law contains an express carve-out for plant-based meat products with labels informing the consumer that the product does not contain meat. On the other hand, statutes in Arkansas and Louisiana specifically include plant-based products among the list of goods that cannot use terms traditionally associated with conventional meat. The result is a contradictory set of rules, which can complicate business operations.¹¹

No state is currently enforcing its recently-passed legislation. Arkansas suspended enforcement of its statute due to pending litigation in federal court,¹² and Louisiana's regulation is not scheduled to take effect until October 1, 2020.¹³ Although compliance is not yet required, once they go into effect, state truth-in-labeling laws carry significant compliance risks for manufacturers of plant-based meat alternatives. For example, "each item" that violates Arkansas's Act 501 may expose a company to civil penalties of up to \$1,000 per item.¹⁴ Similarly, Louisiana's regulation imposes a \$500 civil fine per violation, with each day a violation occurs constituting a separate offense.¹⁵

ONGOING LITIGATION AND FEDERAL INACTION

State truth-in-labeling laws are currently facing numerous legal challenges in federal courts. Specifically, opponents of these statutes have brought litigation challenging these regulations in Missouri, Mississippi, and Arkansas federal district courts.¹⁶ One case was brought by Tofurky Co. challenging Arkansas's truth-in-labeling regulations. Tofurky alleges that Arkansas's truth-in-labeling statute violates its freedom of speech by limiting its ability to truthfully describe its products. Using the phrase "deli slices" to describe Tofurky products, the company argues, is the most accurate description, because it provides the consumer with vital information as to what the product's flavor profile, look, and texture is designed to replicate. Moreover, Tofurky alleges that the regulation may violate the dormant commerce clause, as the law targets products being sold in interstate commerce in an area where the federal government has chosen not to regulate.¹⁷

Neither the FDA nor the FTC, which has concurrent jurisdiction with the FDA with respect to food products marketed to consumers, has brought any enforcement action against plant-based food producers for the use of terms like "meat" or "burger." The FDA and United States Department of Agriculture recently announced, however, that they intend to jointly promulgate rules to govern the emerging cell-based meat industry.¹⁸ This development is consistent with the FDA's ongoing effort to modernize food standards of identity, which is the mechanism through which the FDA may set the regulatory

definition for specific food products. Milk, for example, is defined as "lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows."¹⁹ If the FDA were to set a definition for the word "meat" or for related products, state regulations setting different standards might be preempted.²⁰

This occurred in the related debate over the use of terms like "almond milk" for plant-based dairy alternatives. There, appellate courts in the Ninth and Eleventh Circuits have held that state regulations prohibiting dairy alternatives from using words like "milk" to describe their products are preempted by the Federal Food, Drug, & Cosmetic Act because they go beyond the FDA's requirements. While the FDA regulations would not allow an almond milk manufacturer to label its product simply as "milk" under its standard of identity, appellate courts have held that they may use the word "milk" in conjunction with a descriptor like "soy" that indicates it is plant-based.

Here, if the FDA were to adopt standards for "meat" or related terms like "bacon," those could preempt state regulations prohibiting plant-based products from using those terms in a nonmisleading way. It may still be possible, however, that the courts would allow states to require plant-based meat producers to add nutritional information that enables customers to understand the relative healthiness of these products.

With ongoing litigation likely, and no federal standard to preempt conflicting state laws, plant-based food manufacturers must continue to monitor the changing legal frameworks to ensure compliance.

INTERNATIONAL REGULATION ON FOOD LABELING

International manufacturers of plant-based meat alternatives should take note that European countries are enacting similar legislation. France, for instance, has banned the use of descriptors like "steak" or "sausage" for products that are not partly made of conventionally raised and slaughtered animal meat, and it has not created a regulatory carve-out for plant-based foods.²¹ Failure to comply may give rise to a civil penalty of up to €300,000. And the European Union Parliament's

Agriculture Committee passed similar legislation, which is the first step toward a European Union-wide ban on labeling plant-based products with the terminology of their conventional meat analogues. The legislation still needs to pass the full European Parliament and Council of Ministers.²² As with the legislation in France, it would prevent food companies selling plant-based meat alternatives from using terms associated with traditional meat products. Accordingly, for companies operating internationally, the regulatory landscape is even more uncertain and complex.

KEY TAKEAWAYS

Given the complex and evolving regulatory landscape governing the labeling of plant-based meat alternatives, food companies must stay on top of state, federal, and international legislation to ensure their continued compliance.

In addition, as more jurisdictions create specific and, at times, inconsistent labeling requirements for plant-based meat alternatives, food companies must begin to make jurisdiction-specific decisions as to how they label and market their products to ensure regulatory compliance.

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ENDNOTES

- 1 See Carmen Reinicke, “These 3 Lawsuits are Protecting the Rights of Companies Like Beyond Meat to Call Their Products ‘Burgers,’ ‘Hot Dogs,’ and Other Words Associated With Meat,” *Business Insider* (Aug. 11, 2019).
- 2 See Carmen Reinicke, “These are Beyond Meat’s 16 Highest-Profile Partnerships in the Food Industry,” *Business Insider* (Jul. 24, 2019); Irene Jiang, “Plant-Based ‘Meat’ is Conquering Fast Food. Here’s Where You Can Get Meat Substitutes like the Beyond Burger and the Impossible Taco,” *Business Insider* (Oct. 28, 2019).
- 3 Kate Taylor, “3 Factors are Driving the Plant-Based ‘Meat’ Revolution as Analysis Predict Companies Like Beyond Meat and Impossible Foods Could Explode into a \$140 Billion Industry,” *Business Insider* (May 24, 2019).
- 4 See Laura Reiley, “Veggie Burgers were Living an Idyllic Little Existence. Then They Got Caught in a War Over the Future of Meat,” *The Washington Post* (Aug. 25, 2019) (discussing Tyson Foods’ introduction of a meat-free product line); Amelia Lucas, “Beyond Meat’s Pea Protein Supplier Receives Additional \$75 Million Investment from Cargill,” CNBC (Aug. 28, 2019) (reporting on Cargill’s investments in meat-alternative food products).
- 5 See *id.*
- 6 See, e.g., Ark. Code Ann. § 2-1-302 (prohibiting companies from representing an agricultural product as a meat, beef, or pork product that is not derived from harvested livestock, poultry, or cervids); La. R.S. 3:4741–4746.
- 7 See Nathaniel Popper, “You Call That Meat? Not So Fast, Cattle Ranchers Say,” *The New York Times* (Feb. 9, 2019).
- 8 See Laura Reiley, “Veggie Burgers were Living an Idyllic Little Existence. Then They Got Caught in a War Over the Future of Meat,” *The Washington Post* (Aug. 25, 2019) (“[C]onsumers should know that imitation meat is highly processed and in some cases has more calories and sodium than the real thing.”) (quoting Will Coggin, managing director of the Center for Consumer Freedom).
- 9 See Alina Selyukh, “What Gets to Be a ‘Burger’? States Restrict Labels on Plant-Based Meat,” NPR (Jul. 23, 2019).
- 10 See *Missouri’s Meat Advertising Law*, Missouri Department of Agriculture (Aug. 30, 2018).
- 11 Compare Ark. Code Ann. § 2-1-302 (prohibiting companies from representing an agricultural product as a meat, beef, or pork product that is not derived from harvested livestock, poultry, or cervids.); La. R.S. 3:4741–4746 (same); with Okla. Stat. Tit. 63, §316 as amended by S.B. 392 (2019) (“...packaging for plant-based items shall not be considered to be in violation of the provisions of this paragraph so long as the packaging displays that the product is derived from plant-based sources.”).
- 12 See “Injunction to Stop Enforcement of Meat Labeling Law Not Needed, Says AR,” *The National Law Review* (Aug. 27, 2019).
- 13 See La. R.S. 3:4741–4746.
- 14 See, e.g., Ark. Code Ann. § 2-1-302.
- 15 See La. R.S. 3:4741–4746.
- 16 See Alina Selyukh, “What Gets to Be a ‘Burger’? States Restrict Labels on Plant-Based Meat,” NPR (Jul. 23, 2019).
- 17 *Id.*
- 18 See “Formal Agreement Between FDA and USDA Regarding Oversight of Human Food Produced Using Animal Cell Technology Derived from Cell Lines of USDA-amenable Species,” FDA (Mar. 7, 2019).
- 19 See 21 C.F.R. § 131.110.
- 20 See, e.g., *Painter v. Blue Diamond Growers*, 757 Fed. App’x 517 (9th Cir. 2018).
- 21 See “France to Ban Use of Meat Terms to Describe Vegetable-Based Products,” BBC News (Apr. 20, 2018).
- 22 See Elisabeth Malkin, “‘Veggie Discs’ Could Replace Burgers Under European Food Labeling Proposal,” *The New York Times* (Apr. 6, 2019).

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