

January 2017

Now in Force: Ontario's *Healthy Menu Choices Act, 2015*

Ontario's *Healthy Menu Choices Act, 2015* (the "**Act**") and its regulation (the "**Regulation**") came into force on January 1, 2017. Food service premises with at least 20 locations in Ontario must now comply with the Act's food labelling requirements, focused on displaying calorie information for most food and drink items offered for sale. A copy of the Act and the Regulation may be found [here](#).

What businesses are regulated under the Act?

Many restaurant chains, grocery and convenience stores and other businesses in Ontario fall under the definition of a "regulated food service premise" under the Act. A "regulated food service premise" is a "food service premise" (a food premise that prepares food for immediate consumption or sold or served in a form that will permit immediate consumption on the premises or elsewhere) that is either:

- (i) part of a "chain of food service premises", meaning it is one of 20 or more locations in Ontario operating under the same or substantially the same name, regardless of ownership, offering the same or substantially the same "standard food items"; or
- (ii) any other food service premise provided for in the Regulations. The Regulations set out that cafeteria-style food service premises selling food to the general public that are owned or operated by a person that owns or operates 20 or more cafeteria-style food service premises in Ontario are regulated food service premises.

Regulated food service premises that operate for less than 60 days a year or are located in a school, correctional institution, or child care centre are exempt from the display requirements under the Act.

What food and drink items are subject to the new labelling requirements?

Regulated food service premises are required to display the number of calories for every variety, flavour and size of “standard food item”. A standard food item is a restaurant-type food or drink item offered for sale in servings that are standardized for portion and content, served or processed and primarily prepared in a regulated food service premise, and that is intended for immediate consumption on the premises or elsewhere without further preparation by a consumer.

The following food and drink items offered for sale at regulated food service premises are exempt from the display requirements applicable to standard food items: (i) self-serve condiments available free of charge and not listed on menus, (ii) food and drink items offered for sale for less than 90 days a year, (iii) food and drink items prepared on an exceptional basis in response to a specific customer request that deviates from the offered standard food item, and (iv) food and drink items prepared specifically for inpatients of a hospital or psychiatric facility or for residents of a long-term care or retirement home. Certain standalone food items offered in grocery and convenience stores, such as deli meats, cheeses, olives, antipasti and prepared fruits and vegetables are exempt from the Act’s display requirements. The requirement to display calorie information does not apply to standard food items that are alcoholic beverages, if language prescribed in Section 7 of the Regulation is displayed setting out the approximate caloric amounts of standardized serving sizes of certain standard alcoholic beverages.

How must information about standard food items be displayed?

- Where and What to Display: Calorie information must be displayed (i) on each menu on which the standard food item is listed and (ii) if the standard food item is on display (excluding

alcoholic beverages and standard food items in vending machines), on a label or tag identifying such item. "Menu" is broadly defined and includes paper and electronic menus, menu boards and drive-through menus. Online menus, advertisements and promotional flyers are exempt from the Act's display requirements if they (i) do not list prices for standard food items or (ii) do not list standard food items that can be ordered for delivery or takeaway and do not provide a method to place such an order. In addition to displaying calorie information, a regulated food service premise must display on every menu one of the following contextual statements (or French equivalent):

1. "The average adult requires approximately 2,000 to 2,400 calories per day; however, individual calorie needs may vary."

or

2. "Adults and youth (ages 13 and older) need an average of 2,000 calories a day, and children (ages 4 to 12) need an average of 1,500 calories a day. However, individual needs vary."

As of January 1, 2018, only the second contextual statement noted above may be used. Additional signage requirements to display the contextual statement apply when an individual ordering food or drink or serving himself or herself cannot readily see a menu containing the contextual statement.

- **How to Display:** Section 6 and 9 of the Regulation set out how calorie information and the contextual statement must be displayed, including the placement, content and format of such information. The Regulation also provides specific rules for displaying calorie information for optional standard supplementary items (toppings, sauces, dressings or condiments), standard food items intended to be shared among customers and combination meals. Section 8 of the Regulation sets out the signage requirements for food or drink items that customers serve for themselves.

Determining Number of Calories

The Regulation requires that the number of calories in each standard food item be determined by laboratory testing or a nutrient analysis method. In either case, the owner/operator of the regulated food service premise must reasonably believe that the method will accurately estimate the number of calories in the standard food item.

Consequences of Non-Compliance

Under the Act, inspectors have broad rights to inspect regulated food service premises or any business premises of a company that owns, operates, franchises or licenses such premises. The following fines may be imposed for contravening any provision of the Act or the Regulation:

- For Individuals: Fines of up to \$500 for each day of non-compliance for a first offence and up to \$1,000 for each day of non-compliance for a second or subsequent offence.
- For Corporations: Fines of up to \$5,000 for each day of non-compliance for a first offence and up to \$10,000 for each day of non-compliance for a second or subsequent offence.

A director or officer of a corporation that owns or operates a regulated food service premise has a duty to take all reasonable care to ensure compliance with the Act and the Regulation and is subject to the penalties noted above for individuals if such director or officer fails to satisfy this duty.

Implications for Franchisors

The labelling requirements imposed under the Act and the Regulation are the obligations of the person who “owns or operates a regulated food service premise”, which means a person who has responsibility for and control over the activities carried on at such 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 is not a manager. In light of such new potential liability for franchisors of franchise systems with 20 or more locations

in Ontario, prudent franchisors should ensure franchisees are operating in compliance with the Act and the Regulation and evaluate their operational involvement at the regulated premise to determine if any changes may be made to mitigate their potential liability as an owner/operator of such premises. Guidance on the applicability of the Act to franchisors may come, as the Lieutenant Governor in Council may make further regulations to clarify the meaning of “a person who owns or operates a regulated food service premise”.

Other Food Labelling Reforms

Food labelling reform is also occurring at the federal level, led by the Canadian Food Inspection Agency (“**CFIA**”) with its Food Labelling Modernization Initiative as well as by Health Canada as part of its Healthy Eating Strategy. Our latest reviews of such federal initiatives may be found [here](#) and [here](#). CFIA’s online questionnaire is available for completion until February 28, 2017 and Health Canada is accepting comments regarding its front-of-package labelling proposals until January 13, 2017.

By [Adriana Rudensky](#), [Sean Brandreth](#) and
[William Lee Student-at-Law](#)

For more information on this topic, please contact:

Toronto	Adriana Rudensky	416.865.7149	adriana.rudensky@mcmillan.ca
Toronto	Sean Brandreth	416.865.7114	sean.brandreth@mcmillan.ca

[a cautionary note](#)

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2017