LITIGATION MINUTE: NEW BIOENGINEERED FOOD DISCLOSURE RULES AND LITIGATION RISKS

FOOD AND BEVERAGE SERIES: PART TWO OF FOUR

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

As of 1 January 2022, certain retailers, manufacturers, and importers are required to disclose the presence of bioengineered food and food that contains bioengineered ingredients on products labeled for U.S. retail sale.

In a minute or less, here is what you need to know about the National Bioengineered Food Disclosure Standard (NBFDS or Standard) and the implications of this new federal regulation.

What Are Bioengineered Foods?

The NBFDS defines bioengineered foods as those that contain detectable genetic material that has been modified through certain lab techniques and cannot be created through conventional breeding or found in nature.

To help regulated entities decide whether they need to make a disclosure, the United States Department of Agriculture (USDA) developed a non-exhaustive "List of Bioengineered Foods," which consists of familiar foods such as corn, canola, and cotton. However, even if a food or ingredient is not on the List, disclosure is still required if the manufacturer has actual knowledge that the food is bioengineered.

Who Does the NBFDS Apply To?

The Standard applies to food manufacturers, importers, and retailers who package and label food for retail or bulk food sales. Certain foods and entities are exempt from the disclosure requirement: (i) restaurants and similar retail food establishments; (ii) very small food manufactures (less than $2,500,000 of annual receipts); (iii) a food in which no ingredient intentionally contains a bioengineered substance, with an allowance for inadvertent or technically unavoidable bioengineered presence of up to 5% for each ingredient; and (iv) food certified under the National Organic Program.

What Are the Primary Duties?

Disclosure

The Standard requires regulated entities ensure bioengineered foods are appropriately disclosed. There are four types of bioengineered food disclosures: labeling text, a symbol, an electronic/digital link or quick response code, or a text-messaging phone number, each with its own specific requirements.

Recordkeeping

Regulated entities must keep records for at least two years after the date of sale or distribution. The Standard requires that records be kept if an entity's food or ingredient is on the “List of Bioengineered Foods” or if the entity has actual knowledge that the food is bioengineered.

Enforcement Actions for Failing to Make a Disclosure

The USDA has limited enforcement authority against regulated entities that do not follow the Standard. It does not have authority to issue a recall or impose civil penalties or damages. It can, however, investigate complaints of noncompliance, audit a manufacturer's records, and publish its findings. The Standard allows anyone who suspects a violation of the Standard to submit a complaint to the USDA.

Although the Standard preempts states from establishing conflicting disclosure laws for bioengineered foods, states can adopt identical bioengineered food disclosure laws that impose damages and injunctive relief—remedies that are not otherwise available under NBFDS. In fact, the preemption provision in the Standard expressly states that it does not preempt “any remedy created by a state or federal statutory or common law right.” 7 U.S.C. § 1639j.

While the Standard lacks an independent private right of action, companies that fail to comply with the Standard still face compliance risk from threat of private actions under state laws that adopt the Standard, as well as the state consumer protection and false advertising laws discussed below.

Litigation Landscape

In addition to enforcement actions at USDA, regulated entities who fail to comply with the Standard can expect to be targeted for false advertising lawsuits. Plaintiffs' lawyers will claim that the failure to disclose the presence of bioengineered food when required to do so is misleading to consumers, and that had the consumer known that the product was bioengineered they would not have purchased the product.

Although the NBFDS does not prohibit manufactures from making claims about the absence of bioengineered food (i.e., “non-bioengineered'), manufacturers who make such claims are nevertheless subject to false advertising lawsuits if the product contains genetically engineered materials. In fact, courts have allowed similar lawsuits against manufacturers whose labels say “non-GMO” or “GMO-free” whereas the products actually contain ingredients derived from genetically modified crops or from animals raised on genetically modified feed.

An entity who fails to comply with the NBFDS can also expect to be sued by competitors under the Lanham Act or other state unfair competition laws for misrepresenting the nature and quality of the product in its advertising.

We anticipate the new Standard will usher in a new wave of false advertising and unfair competition lawsuits.

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