

States Not Waiting On Feds To Decide What Makes Meat Meat

By Emily Field

Law360 (April 30, 2019, 6:26 PM EDT) -- With meat made in laboratories a couple years away from hitting grocery store shelves, several states have passed laws banning such food from being labeled as meat. But with no guidance coming anytime soon from federal regulators, those laws will ultimately face preemption challenges when federal agencies eventually weigh in.

At least seven states have passed laws banning the labeling of cell-cultured meat as meat, and some also target the labeling of plant-based meat alternatives. The U.S. Food and Drug Administration and the U.S. Department of Agriculture announced in March they would share responsibility for regulating cell-based meat, with the USDA's Food Safety and Inspection Service in charge of overseeing labeling.

But in the meantime, states are passing these laws "in a vacuum," since the USDA hasn't issued any federal requirements or labeling policy and hasn't taken any preemptive action, said Robert Hibbert of Morgan Lewis & Bockius LLP. And once federal regulations are in place, these states' meat labeling laws will face the prospect of being trumped by federal law.

"If you're captured by the FSIS system, there's very clear federal preemption in the labeling here. Both [the Federal Meat Inspection Act and the Poultry Products Inspection Act] say that the states can't impose different marking ingredient or labeling requirements different that what's required federally," Hibbert said.

Moreover, navigating different states' laws, instead of a national uniform code, is a problem for companies that distribute their products across the country.

"Any business of any size and scope wants to play by one set of rules, and there's a big potential problem if you've got different states requiring different things," Hibbert said.



At least seven states have passed laws banning the labeling of cell-cultured meat as meat. (David Parry | PA Wire)

The USDA and the FDA announced their agreement to share the regulation of cell-cultured meat only in early March, so regulations are unlikely to come in the near future. But states, particularly those in the Plains and with large numbers of cattle ranchers, are passing these laws out of an interest in protecting local industries, attorneys said.

In addition to the seven states that have already passed these laws, more than 20 are mulling similar bills, according to Nicole Manu, an attorney with the Good Food Institute, a nonprofit advocacy group for plant-based and cell-cultured foods.

"We think the biggest reason [behind the bills] is to send a message to the USDA, to send a message to Congress saying this is how we would like you to come up with labeling rules," Manu said. "All these states are trying to get USDA to act in a certain way."

The trend does seem premature, given that cell-cultured meat hasn't yet hit the mass market, Paul Benson of Michael Best & Friedrich LLP said.

But the arguments that cell-cultured meat is good for the environment have persuasive appeal and have some in the meat industry concerned that lab-grown meat could change meat-eaters' habits, according to Benson.

One Netherlands-based startup, Mosa Meat, created the first hamburger from cultured cells and plans to introduce its products to the market by 2021. Memphis Meats, in which Tyson Foods Inc. has a stake, is also reportedly aiming to get its products to the market by then.

Most recently, the Montana Legislature passed the Real Meat Act, which defines hamburger or ground beef as being made from livestock. This trend was kicked off by Missouri, which last year banned the use of "meat" or terms like "sausage" or "burger" on plant-based or cell-cultured foods.

Some of the states' laws, such as Mississippi's, also ban meat labeling for plant-based food; Arkansas' "Truth in Labeling" law goes a step further and bars products from being labeled "cauliflower rice." Other states passing laws are the Dakotas and Wyoming.

While meat is regulated by the USDA, plant-based foods are regulated by the FDA. The Food Drug and Cosmetic Act preempts states from issuing their own food labeling laws, but only to the extent that they conflict with the agency's specific regulations for food, according to Justin Prochnow of Greenberg Traurig LLP.

Noting Arkansas' ban of the "cauliflower rice" label, Prochnow said there's no federal regulation for the specific definition of rice.

The opposition to labeling cell-cultured meat as meat has come from different avenues, largely cattlemen's groups and state farm bureaus.

The Missouri Cattlemen's Association, which backed the Missouri bill, said the law "simply requires marketing with integrity."

"You can't sell a Subaru as a Corvette," MCA executive vice president Mike Deering said in a statement. "You shouldn't be able to sell a product manufactured in a laboratory as something grown by farm and ranch families."

Manu of the Good Food Institute, however, said forbidding cell-cultured meat from being labeled as meat poses a risk to consumers who are allergic to meat or poultry, and may not understand that cell-derived meat poses the same risk of allergic reaction as meat that comes from livestock.

The states' laws also raise issues of commercial free speech versus states' ability to bar deceptive labeling.

Missouri's law, passed in late August, was quickly met with a lawsuit filed by the maker of Tofurky, joined by the Good Food Institute, saying the law violates the rights of food companies to accurately describe their plant-based products as meatless alternatives to traditional meat.

In grocery stores, plant-based meat alternatives are often labeled with terms such as "meatless meatballs," Manu said.

"The idea is trying to convey to consumers what the product is, but obviously showing that it is not animal meat but instead it's functionally similar to animal meat," Manu said. "So producers have that First Amendment right to truthfully communicate to consumers what the product is."

The groups' complaint also notes the FDA has never brought an enforcement action against a maker of plant-based foods for labeling its products as analogues for meat or using "meat" or "meat"-like terms on its labeling.

The parties are hashing out a settlement, according to court records, with a Wednesday deadline. That deal could provide some guidance on how states can handle the issue, according to Benson.

"It will be fascinating to see what that settlement looks like because that may lay the groundwork for what's going to come at a state level and a federal level," Benson said.

The issue is reminiscent of the debate over whether beverages made from soy or nuts should be labeled as milk, attorneys noted. The FDA is mulling whether consumers are confused by the labeling and whether they think plant-based milk has the same nutritional qualities as dairy milk.

"To what extent you can use traditional terminology with nontraditional products — with a broader brush, that's the issue," Hibbert said. "As the food industry continues to evolve, I think you're going to have more of these questions."

--Editing by Brian Baresch and Marygrace Murphy.