Foster Garvey

Duff on Hospitality Law

Warning: Eating Here May Kill You!

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Understanding Basic Menu Health Warning Requirements in the State of Washington

Over the past several months, we've received a number of client inquiries regarding menu labeling requirements, specifically the warnings required under Washington's Food Code. A companion piece on Oregon's requirements will be posted soon. Enjoy.

From fine dining to family-style restaurants, menus set the tone and begin a dialog with their patrons about the variety of food and drink options offered by the dining establishment. They also serve as real estate for public safety and legal disclaimers intended to protect patrons from food borne illness–and restaurateurs from claims and lawsuits. Aside from Pacific Northwest *Portlandia* comic relief (a television show based in Portland whose first episode features diners inquiring about the quality of life of the chicken they are about to order), many actually read the fine print off menus: Where are those oysters from? How was that albacore caught? Are the tomatoes heirloom?

The fine print is everywhere. For instance, the state of Washington requires certain disclosures regarding automatic service fees, as well as the calorie count for a cheeseburger at chain restaurants. For the sake of simplicity, start with your menu. Restaurateurs need to consider warnings for food and drink that could cause fairly immediate sickness–primarily food and drinks that are purposefully undercooked or not fully pasteurized.

The specific requirements for menu "warnings" in Washington are contained primarily, but not exclusively, within the State's adopted version of the National Food Code (See WAC 246-215). Generally speaking, under the adopted Food Code, a menu warning is required when a restaurant offers unpasteurized juices or feeds of animal origin that are served raw or undercooked. There are a few specific exceptions to the rule that may be worth looking into on an individual restaurant basis. Identification should be at the point where the food is selected by the consumer which is often the menu, but in other cases may be a placard or order board.

If your restaurant serves the types of food for which warnings are required, then you need to provide a two-prong warning containing a Disclosure and a Reminder.

The first part of the warning is the DISCLOSURE, for instance:

The cooking status is explained in the menu description:

- Oysters on the half-shell (raw oysters)
- Raw-egg Caesar salad

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- Our Steaks are cooked to order; or

A footnote (with asterisk or other indicator) states that the marked items:

- Are served raw or undercooked, or
- Contain (or may contain) raw or undercooked ingredients.

The second part of the warning is the REMINDER, so for instance:

- Consuming raw or undercooked meats, poultry, seafood, shellfish or eggs may increase your risk of foodborne illness.
- Unpasteurized juice may increase the risk of foodborne disease to people with certain medical conditions.

The Disclaimer and Reminder need to be located next to one another and where menus are concerned must be visually equivalent to 11 point font.

But, you said these disclaimers may actually help me-how does warning people that a Caesar salad can kill them help the restaurant? In short, the regulations help because they attempt to *create a clear legal duty for the restaurant*. If you comply and a patron ignores the warning and gets sick, you have something to talk about when they call up to tell you about how great their lawyer is. Indeed, the basis for most tort claims in restaurants is "negligence" - the failure of the restaurant to comply with a duty owed to its customer. These "duties" are not always clear, however, and within case-law, continue to change and evolve. When the State creates a specific legal requirement, however, most courts will treat that as the "standard of care" or "duty" that was required of the restaurant. If the restaurant complies, it will be considerably more difficult for a plaintiff to successfully sue. Unfortunately, there are still some issues on the edges that are not settled such as disclaimers about nuts, alcohol in food, and the potential for bits and bones. Disclosures of these types are not squarely within Washington's current menu disclaimer regulations and so restaurants and their lawyers are left to determine whether specific additional warnings are advisable.

Anyone with further questions can contact Greg in Seattle, or Joy Ellis, in Portland.

Posted in Food and Beverage

Tagged as automatic service fees, calorie count, menu disclaimer regulations, National Food Code, Portlandia, WAC 246-215

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