Law and the Public's Health

THE NATIONAL UNIFORMITY FOR FOOD ACT: IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

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This installment of Law and the Public's Health examines the National Uniformity for Food Act of 2005 (NUFA),¹ a food safety bill passed by the U.S. House of Representatives in March 2006, which has significant implications for states' powers to establish food safety protection programs. Whether NUFA ultimately becomes law during the 109th Congress is not yet clear, but if enacted, its impact on state powers to set food and safety standards will be considerable. Indeed, it has been estimated that NUFA could eliminate over 80% of current food safety and security programs in the U.S.,2 continuing a pattern of federal interventions whose effect is the preemption of state powers to protect public health. The article concludes with a discussion of NUFA's public health policy and practice implications.

BACKGROUND AND OVERVIEW

The nation's current food safety regulatory framework is a complex interplay of federal, state, and local law. Governmental agencies at all levels partner to inspect, test, research, and monitor the food supply, acting under distinct and at times overlapping grants of power. At the federal level, the Food and Drug Administration (FDA), U.S. Department of Agriculture (USDA), Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS), and the Environmental Protection Agency (EPA) work to develop, implement, and enforce food safety laws covering the nation, while state and local governments oversee the food safety for products within their jurisdictions. While federal food safety activities receive much attention, in fact the vast majority of food safety activity occurs at the state or local level.^{2,3} All states regulate the food supply to some degree, and state powers extend to requirements that manufacturers and sellers affix warning labels to all foodstuffs sold in the state.4-6 For this reason, the federal government historically has relied on state and local laws and activities to help ensure food safety. Indeed, the federal government is explicitly authorized by law to

engage the cooperation of any state in order to protect the national food supply.⁷

NUFA

NUFA was introduced in the House of Representatives by Congressman Mike Rogers and passed by a vote of 283-139. No hearings were held on the legislation, and the bill has been received by the Senate Committee on Health, Education, Labor, and Pensions. NUFA amends the Federal Food, Drug, and Cosmetic Act to prohibit states or localities from establishing or continuing in effect food safety and warning requirements that are not identical to federal regulations. According to the measure's sponsors, its purpose is to provide uniformity in food safety regulation and warning requirements by simultaneously creating national standards and barring the application of alternative state standards.8 Some suggest this national uniformity requirement applies not only to food labels, but to advertising, posters, public notices, and all other means of communication that the regulated industry utilizes.9 Moreover, the uniformity mandate covers any form of notification requirement regardless of whether the notice arises from public health laws or from laws aimed at consumer protection or the prevention of unfair competition.

Because numerous states presently have warning requirements that would inevitably violate NUFA's uniformity clause, the bill passed by the House provides a mechanism for FDA review to determine whether the state warning should be exempted from uniformity or adopted as a national standard. FDA may grant an exemption if the state is able to demonstrate that the warning (1) has been issued pursuant to state law; (2) protects an important public interest that otherwise would go unprotected; (3) would not cause the food to be in violation of any federal law; and (4) would not unduly burden interstate commerce. States would be required to apply for such an exemption for all laws for which an exemption is desired within 180 days of NUFA's enactment. State laws for which no exemption is sought, that are denied an exemption, or that are not adopted as a national standard would be nullified. Under standards applicable to federal agency review of regulatory actions, the FDA would have broad authority to deny the exemption. The Congressional Budget Office (CBO), which issues estimates of the financial impact of federal legislation, estimates that states will submit about 200 exemption petitions in 2007 alone if

NUFA becomes law, costing the FDA roughly \$400,000 to review each one.10

NUFA also authorizes emergency state actions in those situations where it is needed to address an imminent health hazard that is likely to result in serious adverse health consequences or death. In order to exercise this authority, however, a state must notify the FDA about the matter, and within 30 days of furnishing notice, must submit a petition for an exemption from the uniformity standard. As with petitions for state law exemptions, the FDA would have broad powers to grant or deny emergency authority.

The legislation would not affect state powers to require food labeling and warning identical to those required by the federal government.8 Furthermore, NUFA would exempt certain food warning categories: freshness-dating, open-date labeling, grade labeling, state inspection stamps, religious dietary labeling, organic or natural designation, returnable bottle labeling, unit pricing, and statements of geographical origin.8

CONCERNS ABOUT NUFA

NUFA has raised a number of concerns related to its preemptive sweep and the burdens that it would place on state efforts to engage in local public health protection, particularly in emergencies. Although the precise issue is food labeling and warning, NUFA's greatest impact may be its precedential power to replace state food safety regulation. Indeed, the House Report on NUFA notes that the preemptive effect of the bill is ambiguous, and that NUFA may operate more broadly to preempt not only food labeling laws but other state food requirements as well. 11 The CBO estimates that laws in all states would be affected by NUFA.¹¹

A second concern relates to NUFA's effects. Proponents argue that the purpose of the legislation is to promote uniformity in food labeling and also point out that uniformity is already the standard in many food regulatory schemes, such as nutrition labeling and meat and poultry requirements.¹² Opponents, however, argue that the measure is a subterfuge for a wholesale "de-labeling" campaign that will significantly limit the type and quality of information about potential food dangers. In opponents' view, what is critical to understand about NUFA is that it would preempt state laws even where no federal standards exist. This total displacement of state law reflects a radical use of federal preemptive powers to create "field" preemption (i.e., preventing states from acting even where the federal government chooses not to) rather than the more traditional approach of "conflict" preemption

(i.e., displacing state laws only when in direct conflict with federal laws).2

For example, federal law does not require shellfish warnings. NUFA, by setting federal law as the standard, could result in the application of no standard. This means preemption of state laws requiring shellfish warnings. Several states with significant shellfish industries have pursued such regulation; one example is California, which implements strict regulations including warning labels in multiple languages. 13 Such regulation would be preempted if NUFA is enacted.

California's Safe Drinking Water and Toxic Enforcement Act of 1986 is another state law that would be preempted under NUFA. This law requires the governor of California to revise and republish, at least once a year, a list of chemicals known to the state to cause cancer or reproductive toxicity. Food producers must give clear and reasonable warnings to individuals for foods that contain levels of these chemicals that are above the safe harbor amount.

The Florida Citrus Code would also be affected if NUFA is enacted. Promulgated to stabilize and protect the citrus industry in Florida, the citrus code authorizes the state to adopt, alter, or amend its rules and regulations as necessary to protect its major agricultural enterprise. New York's requirement that labels note when high levels of lead or mercury are present in products, or Minnesota's rule that grocery shoppers must be told when alcohol is an ingredient in candy, are all subject to preemption under the new national scheme. Smoked fish regulations in Wisconsin and Michigan are also under attack if NUFA becomes law, unless the FDA provides an exemption or adopts a national standard for these types of protections.

State law preemption also raises bioterrorism concerns. NUFA opponents claim that widespread preemption will jeopardize states' ability to respond to bioterror threats. Because the current food safety and security system will be significantly disrupted for years under NUFA, our ability to track suspected acts of intentional adulteration will be severely hampered. The imminent hazard authority in NUFA does not address these concerns, for a state facing an emergency must first enact a requirement to address the problem, and then notify the FDA of the new state law and make a determination as to whether the federal government is going to act on the threat—all unrealistic approaches for addressing a true emergency.

Last, the fact that NUFA was passed in the House without hearings has led 37 state attorneys general to protest enactment of legislation that, without careful consideration, would sweep away an entire body of state law.14 An issue of such great concern clearly should have its broad implications reviewed through the congressional hearing process.

IMPLICATIONS FOR PUBLIC HEALTH PRACTICE

NUFA holds important implications for public health policy and practice. Its immediate effect is to jeopardize hundreds of state and local public health laws, even in situations in which there may be no federal standard to take their place. Because the measure involves field rather than conflict preemption, it may result in deregulation of the food supply far more than it leads to uniform standards. Furthermore, although NUFA involves the broad displacement of state public health laws in one specific field, the principle on which it rests-the primacy of commerce over public health—is one that has been a recurring theme in the American legal system for centuries. At the turn of the 20th century, debate raged over the proper balance between state public health powers and national market interests. In the current legislative era, the debate continues in much the same way.¹⁵

The difference between then and now may be the magnitude of public health threats, both naturally occurring and manufactured. With the enormous emphasis now placed on federal/state collaboration in the area of public health protection, a law that would virtually cripple state powers to act rapidly and decisively in the face of a threat would seem to contradict other efforts, such as the release in May 2006 of the national avian influenza plan, whose principal message is promotion of decentralization and state empowerment in order to protect the public health.

NUFA thus is another chapter in the federalism debate currently taking place in all branches of government, ranging from the power to regulate the practice of medicine to the power to protect the wishes of dying patients. At times the countervailing interest, as in NUFA, is markets; at other times, as in cases involving the sanctioning of physician-assisted suicide, the issue

may be a clash of values. Regardless of the underlying cause, the result is a legal period characterized by a remarkable degree of tension over the proper balance of powers in a federal system of government.

Public health policy and practice is remarkably state-driven. It may be that modern society can no longer afford the diffusion of power and decision-making that is a hallmark of federalism, but this issue is one that compels lengthy and careful debate over the long-term.

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