



Legislative Background Brief

for the
Economic Affairs Interim Committee

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Review of Other States' Milk Policies and Other Background Information for Discussion of Montana's 12-Day Sell-By Rule

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As a subcommittee of the Economic Affairs Committee considers whether to put into statute a directive regarding sale dates for Grade A milk, there are questions of how other states handle milk sales and what the implications may be for changing the sell-by date now in Montana administrative rules. This review also includes background information on Montana's milk pricing history as well as its sell-by dating rule and related information on various parties' concerns.

The states in the Table below are among those listed as having date labeling for processed milk or milk products in a September 2013 Natural Resources Defense Council - Harvard Food Law and Policy Clinic Report: "The Dating Game: How Confusing Food Date Labels Lead to Food Waste in America". Some states may have general requirements that include milk, but if milk is not specifically listed, that state is not included here.

State	Directive
California	Date labeling is required to inform consumers of the date established by the processor that is most likely to ensure quality, after which the product is normally removed from the shelf. There is no restriction on sales of milk after the listed date.
Connecticut	Date labeling required regarding a "last sale date", but sales after that date are not restricted for milk.
Florida	Allows either the date of "manufacture" of the product or the last day the product may be offered for sale. No milk or milk product may be offered for sale as a "grade A product" after the shelf-life expiration date approved by the department.
Georgia	Milk and milk products must be marked with a sell-by date, which is said to be synonymous with an expiration date, best-by date, and best-before date. The date is the last day milk can be sold at retail or wholesale.
Hawaii	Date labeling by the processor is required, but there is no restriction on sales after that date.
Kentucky	Requires an "open date" as the period during which the milk product is acceptable for consumption. Products not sold during the open date period are to be removed from shelves and returned to the processing plant of origin for destruction.
Maryland	Requires a sell-by date and establishes limits on commercial or institutional use within 4 days of the sell-by date.

Michigan	Requires the processor to put sell-by dates on milk container and limits sales after the sell-by date to only products advertised as being beyond the recommended last day of sale.
Montana	Sell-by date of 12th consecutive day after pasteurization of milk. Milk may not be sold after the sell-by date. The person offering the milk for sale is responsible for removing milk at or near the 12th day unless otherwise stated.
Nevada	Requires the processor to put a date on which the product is to be removed from sale. Actual sales after that date are not prohibited.
New Hampshire	Requires a date label for cream as determined by the manufacturer. Sales after the date are not prohibited.
New Jersey	Requires a date label such as "not to be sold after" or "sell by" along with the name of processor or plant. Product may not be sold after 11:59 p.m. of sell-by date, but may be consumed after that date.
New Mexico	Allows processors of pasteurized products to determine the "pull" date. Sales after the pull date are prohibited.
Pennsylvania	Limits sell-by date to 17 days beginning after midnight on the day the milk is pasteurized. Requires a label and prohibits sales after that date.
Virginia	Milk is not listed among dairy products, which must be labeled. (Sweetened skim milk is listed.) Label of sell-by date is required. Product may not be sold after sell-by date.
Washington DC	Pull date for pasteurized fluid milk is required. Sales are not permitted after the pull date unless the product is isolated and there is a prominent display noting the product is at risk of spoilage or loss of palatability.

Background Information

Number of Montana Dairy Farms

- A 2013 graduate thesis on Montana dairy farms by Laura Ginsburg noted that the number of dairy producers in Montana had dropped from 218 in 1990 to 70 in 2012.

Amount of Milk Produced in Montana

- In 2012, Montana dairy cows produced 293 million pounds of milk. This was the highest since 2009 but lower than the 368 million pounds in 2005, which was a high in the 2002-2012 period.

Number of Processing Plants

- There are three private processing plants: one in Bozeman operated by the Seattle-based cooperative Darigold and two Meadow Gold plants in Great Falls and Billings. Meadow Gold is a subsidiary of Dean Foods. The state also has a processing plant as part of the Montana Correctional Enterprises farm.

Number of Distributors/Jobbers

- Distributors/jobbers may be interstate regional, like Core-Mark, or intrastate regional.
- Distributors also may be contracted to handle only one type of store or one type of product (for example Chobani has a licensed distributor that handles Montana).
- Of the 79 distributors/jobbers licensed in Montana, 49 are out-of-state and 30 are in-state. Overlap (both in-state and out-of-state distributors under the same name) exists for

Associated Food Stores, Darigold, Inc., and Food Services of America. Another big operator, Sysco, has just a Billings licensee.

Major Sellers - Where do they get their milk?

- Costco and WalMart both have contracts with the Bozeman Darigold plant.

How do distributors/retailers handle milk approaching its sell-by date?

- As milk cartons approach the sell-by date, distributors may pull the products from shelves and send those products for remanufacturing into other dairy products that do not have a 12-day sell-by date requirement. Some retailers offer discounts on milk as the product approaches the 12-day sell-by date. If there is storage space, some retailers might delay putting out the freshest milk if cartons approaching the sell-by date are still on the shelves.

What impact would a later sell-by date have on rural areas in terms of distribution of products?

- Distributors now service areas approximately once a week. There is the prospect that a longer sell-by date or best-if-used by date might mean less frequent distribution, which may be not only for milk but for all products delivered to that store.

Concerns

The following concerns have been raised regarding changes to the sell-by date in Montana:

- Potential loss of dairy processors, which in turn may lead to a loss of dairy farms if out-of-state processors rely on nearby production rather than shipments of Montana milk.
- Waste of palatable milk and the costs of disposal.
- Major sellers may sway the market, again by directing purchases of milk products outside of Montana, if there is a long sell-by date.

History of Milk Pricing

In December 1976 the Legislative Auditor's Office stated in its "Report on the Need for Milk Price Regulation in Montana" that the government intervened in 1933 to guarantee an adequate milk supply at both the federal and state levels. The idea was in part to protect producers and to avoid situations in which price competition could drive out producers through artificially low prices. Direct federal price regulation was short-lived, according to the audit, and evolved to Federal Milk Market Orders, which set minimum but not maximum producer prices. Federal Milk Market Orders continue today in some areas as a way of preventing wild price fluctuations. (See <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateO&navID=IndustryMarketingandPromotion&leftNav=IndustryMarketingandPromotion&page=FMMOProgramObjectives>) See map. (Shading differences are to delineate areas.)

Montana's 1935 Legislature created a Board of Milk Control and declared that a public emergency existed "growing out of the unhealthful, unfair, unjust, destructive, and demoralizing trade practices now obtaining in the production and distribution of milk and cream in this state...". Montana initially regulated milk sales and prices from producer to retail at a minimum price level. The 1976 legislative audit reported "strong evidence that milk in Montana is overpriced" and indicated that milk price controls at the resale level "are no longer in the public interest and ... may have an adverse effect upon both consumers and dairy farmers...".

During a reorganization of state agencies in the 1960s, the Board of Milk Control became administratively attached to the Department of Business Regulation, which then evolved to the new Department of Commerce in 1981. The Board of Livestock became the administrative entity

for the Board of Milk Control in 1995. That was the same year that the Legislature ended minimum milk price controls on wholesale, jobber, distribution, and retail sales. Minimum price controls remain on producer sales of milk, as provided in 81-23-302, MCA, using a formula set forth in administrative rules. State law also allows for a petition by 10% or 20 licensed producers in Montana, whichever is less, to seek a statewide pooling arrangement. A pooling arrangement currently is in effect.

History of Sell-By Date

In 1980 the Board of Milk Control adopted a 12-day sell-by date for Grade A milk, which means that a processor must mark the sell-by date as of 12 days from the date of pasteurization. The rule, [32.8.202](#) ARM, also states that milk may not be "sold or otherwise offered for public consumption" after that date. The person who offers the milk for sale to the public is responsible for removing the milk before or upon the expiration date unless other arrangements are agreed to. The administrative rule has been amended in 1986, 1987, and 2000.

Efforts to bring about a rule change through lawsuits currently are underway in Core-Mark v. Board of Livestock, in the Montana Supreme Court under case number [DA 13-0595](#). The case includes Dean Foods doing business as Meadow Gold Dairies and the Montana Milk Producers Association as intervenors on behalf of the Board of Livestock. Friends of Montana Retailers also are among the parties involved in the case.

Core-Mark filed its first case against the Board of Livestock in federal court in 2008 and later agreed to dismiss without prejudice with a stipulation that the state further review the issue. The next steps are part of the lawsuit regarding whether subsequent hearings (using a hearings officer) were part of a contested case hearing or a two-part process that included an evidentiary administrative hearing with public comment. The hearings officer's proposed decision included a recommendation that the Board of Livestock repeal the 12-day rule and adopt rules permitting processors to set the date on the milk label. It was also recommended that the Board of Livestock consider rules setting minimum standards for testing methodologies. When the Board of Livestock upheld the current 12-day sell-by rule, Core-Mark appealed to the District Court, which upheld the Board's decision. Core-Mark then appealed to the Montana Supreme Court, where the issue now rests.

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