



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

February 10, 2016

Representative Paul Holvey  
900 Court Street NE H277  
Salem OR 97301

Re: State authority to regulate retail sale of genetically engineered fish for food—HB 4122-3

Dear Representative Holvey:

You have asked us whether the -3 amendments to House Bill 4122, which relate to food labeling, are preempted under federal law. We conclude that there is no federal preemption regarding the subject of the amendments.

The amendments require genetically engineered fish that is displayed for retail sale for human consumption to include a label stating that the fish is genetically engineered. The amendments also require that packaged products containing genetically engineered fish being sold at retail for human consumption bear a label stating that the fish is genetically engineered. Finally, the amendments require that containers for bulk shipments of genetically engineered fish to a food retailer in this state bear a label stating that the fish is genetically engineered.

If federal law prohibited states from imposing labeling requirements, or if the amendments imposing labeling requirements were inconsistent with a federal labeling requirement, the amendments would be preempted. Food labeling is regulated at the federal level primarily by the United States Food and Drug Administration (FDA). Although the federal labeling laws are extensive, they are not so pervasive as to preoccupy the field and prevent state regulation. Federal law does not require the labeling of genetically engineered foods as long as the foods are not significantly different from their traditional counterparts. However, the FDA decision to not require labeling under federal law does not equate to a prohibition against mandatory labeling under state law. Therefore, the federal law does not prohibit states from imposing labeling requirements and does not present a danger of inconsistent labeling requirements.

Vermont was the first state to pass a law requiring the labeling of genetically engineered foods. Legal challenges to that law seem likely, but we are not aware of any pending challenges. Connecticut and Maine have also passed labeling laws, but operation of those laws is contingent upon action by other states. Mandatory labeling laws for genetically engineered foods are currently under consideration in several states. Legislation (H.R. 1599) has been proposed in Congress that would prohibit states from adopting labeling requirements for genetically engineered food products, but we have no way of evaluating the chance that the proposed legislation will become law. If such a law is enacted, the federal prohibition will invalidate any state laws requiring the labeling of genetically engineered foods. Legislation has also been proposed in Congress to prohibit the sale of genetically engineered foods unless labeled (H.R. 913 and S. 511) and to prohibit the sale of genetically engineered fish unless labeled (H.R. 393 and 738). If any of those bills were to pass, they would supersede any state laws requiring labeling to the extent that the state laws were inconsistent with federal labeling requirements.

Preemption could also occur if labeling requirements violated a provision of the United States Constitution. A violation of the right to free speech can occur if a state law compels a person to engage in speech activity that the person finds objectionable. West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943). The compelled speech doctrine acts to ensure that the government does not use its regulatory powers to suppress unpopular views or information, or to force promotion of a particular viewpoint. The state could not, for instance, require a label statement indicating that genetically engineered fish are inferior to fish that are not genetically engineered. However, a mandate that requires disclosure of purely factual and uncontroversial information on a commercial product in order to further a state's interest in providing consumers with information does not violate a manufacturer's right of free speech. See American Meat Institute v. United States Department of Agriculture, 760 F.3d 18 (D.C. Cir. 2014) (upholding mandatory country of origin labeling for meat). Although the significance of genetic engineering in foods may be controversial, the presence or absence of genetically engineered fish in a product is not controversial and does not imply a viewpoint concerning genetically engineered fish in food. Therefore, the labeling required by the -3 amendments to House Bill 4122 is both factual and uncontroversial.

Preemption may also occur if a state law interferes with interstate commerce, either by giving in-state commerce preferential treatment or by burdening interstate commerce to a degree that outweighs the legitimate regulatory interests of the state. The amendments do not treat genetically engineered fish sourced from within Oregon in a preferential manner, so the only relevant question for interstate commerce purposes is whether the burden that labeling imposes on commerce outweighs the state interest in requiring labeling. Notwithstanding that concerns over genetically engineered foods are a controversial subject, the state has a strong interest in ensuring that Oregon residents be provided with information that is possibly beneficial to protecting their health. In contrast, any increased cost resulting from the need to comply with the labeling requirements would not be considered a burden on interstate commerce. Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). Therefore, the -3 amendments to House Bill 4122 do not unduly burden interstate commerce.

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Very truly yours,

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Legislative Counsel



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