

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #3

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2007 JUL 27 PM 5:09

WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: DHHR - Bureau for Public Health TITLE NUMBER: 64

CITE AUTHORITY: §§16-1-4 and 16-6-2

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 17

TITLE OF RULE BEING AMENDED: FOOD ESTABLISHMENTS

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Martha Yeager Walker
Authorized Signature

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 64CSR17 - Food Establishments

Type of Rule: x Legislative Interpretive Procedural

Agency: Health and Human Resources

Address: Building 3, Room 206
Capitol Complex
Charleston, West Virginia 25305

Phone Number: (304) 558-2971 Email: annsparer@wdhhr.org

Fiscal Note Summary

Summarize in a clear and concise manner what effect this measure will have on costs and revenues of state government.

This Rule repeals and replaces an existing Rule and updates references to Federal regulations. There will be no additional revenues generated from the adoption of this Rule. Costs to implement this rule revision will be for training of staff and printing inspection report forms and educational materials.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

Effect of Proposal	Fiscal Year		
	2008 Increase/Decrease (use "-")	2009 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	11,700	11,700
Personal Services		4,400	4,400
Current Expenses		7,300	7,300
Repairs and Alterations			
Equipment			
Other			
2. Estimated Total Revenues			

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

These expenses include providing training to local and state health department sanitarians on the changes in the 2005 Food Code and the cost of printing updated inspection and reference materials.

Training will be held at five locations around the state (one at the central office, incurring no additional cost for meeting room or staff accommodations). Two personnel will conduct the training. Personnel expenses for this training is estimated at \$4,400. Travel expenses for these personnel are estimated at \$1,200. Vehicle expenses for this travel is estimated at \$600. Hospitality (to include room rental) is estimated at \$2,000.

Printing expenses are estimated at \$3,500. This includes 20,000 inspection report forms for use by local and state sanitarians and 13,000 code reference packets to be distributed to permitted facilities.

Memorandum

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

[Empty box for memorandum content]

Date

Agency

Department of Health and Human Resources

Authorized Representative

Martha Yeager Walker

Martha Yeager Walker
Secretary

FOOD ESTABLISHMENTS

BRIEF SUMMARY OF PROPOSED RULE

The rule proposes to amend the Food Establishments rule. The current rule references the 1999 FDA Model Food Code, and the new rule references the 2005 FDA Model Food Code. This rule maintains a regulatory program that ensures protection of the State's food supply. The major changes are as follows:

1. Establishments that serve raw or partially cooked foods will be required to include a consumer advisory, warning of the potential dangers of these products.
2. The definition of "food establishments" is expanded to include facilities conducting educational cooking courses.
3. The definition of "person in charge" is included.
4. All references to the term "whole-muscle, intact beef" are included.
5. Preventing contamination from hand contact was changed to reference the Food Code, rather than being redefined in sections of the previous Rule.
6. The number of immediately uncorrectable critical violations necessary for the closure of a food establishment was decreased from five (5) to three (3).
7. References to implementation were modified to reflect the adoption of the updated 2005 FDA Model Food Code.

Economic Impact - The revised rule is not expected to have an adverse economic impact.

Jobs impact - The revised rule is not expected to have an adverse impact on jobs in the regulated industry.

Environmental Impact - The revised rule will not affect the environment.

STATEMENT OF CIRCUMSTANCES

This is a significant revision of the state Food Establishments rule to bring it into compliance with the federal 2005 Food Code.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 27, 2007

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* DHHR Bureau for Public Health,
Office of Environmental Health Services
1 Davis Square, Suite 200
Charleston, WV 25304-1978
(304) 558 2891

LEGISLATIVE RULE TITLE: _____
FOOD ESTABLISHMENTS, 64CSR17

1. Authorizing statute(s) citation §§16-1-4 and 16-6-2

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 25, 2007

b. What other notice, including advertising, did you give of the hearing?
NA

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 25, 2007, at noon

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received _____

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

NA

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Ann Spaner, Director, Public Health Regulations

250 Capitol Street, Room 702

Charleston, WV 25301

(304) 558-2971

(304) 558-1035 fax

annspaner@wvdhhr.org

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Linda Whaley, R.S. Food Program Manager/Training Officer, BPH

1 Davis Square, Suite 200

Charleston, WV 25301

(304) 558-6727

Fax: (304) 558-1071

lindawhaley@wvdhhr.org

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

NA

b. Date of hearing or comment period:

From June 25, 2007 to July 25, 2007 at noon

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

NA

d. Attach findings and determinations and reasons:

Attached NA

COMMENTS AND RESPONSES

WVDHHR, Bureau for Public Health 64CSR17, Food Establishments Rule

1. Judy Curry, Child Care Program Director July 2, 2007

Linda,

The definitions and terminology have changed in the Licensing Law. I think your code should be changed to reflect the current terms and definitions.

(n) "Family child care home" means a facility which is used to provide nonresidential child care services for compensation in a provider's residence. The provider may care for four to six children, at one time including children who are living in the household, who are under six years of age. No more than two of the total number of children may be under twenty-four months of age.

(o) "Family child care facility" means any facility which is used to provide nonresidential child care services for compensation for seven to twelve children, including children who are living in the household, who are under six years of age. No more than four of the total number of children may be under twenty-four months of age. A facility may be in a provider's residence or a separate building.

BPH Response: In order to be consistent with the definitions provided in §49-2B-2, this Rule will be changed to reflect these updated definitions.

Subsection 2.2. will state: "Family child care facility" means any facility which is used to provide nonresidential child care services for compensation for seven to twelve children, including children who are living in the household, who are under six years of age. No more than four of the total number of children may be under twenty-four months of age. A facility may be in a provider's residence or a separate building."

Subsection 2.3. will state: "Family child care home" means a facility which is used to provide nonresidential child care services for compensation in a provider's residence. The provider may care for four to six children, at one time including children who are living in the household, who are under six years of age. No more than two of the total number of children may be under twenty-four months of age."

The term "family day care facility" in subdivision 5.1.a. will be changed to "family child care facility." The term "family day care home" in subdivision 4.3.f. will be changed to "family child care home".

2. Melissa Dawn Smith, MA July 2, 2007

Linda,

The only comment that I have is.....the term Family Day Care Home or Facility , is now referred to as Family "Child Care" Home or Facility.

COMMENTS AND RESPONSES

WVDHHR, Bureau for Public Health 64CSR17, Food Establishments Rule

BPH Response: In order to be consistent with the definitions provided in §49-2B-2, this proposed Rule will be changed to reflect the updated definitions as indicated above.

3. Cara N. Harding, R.S. and Amy R. Edwards, Sanitarian July 19, 2007

Ann Spaner
Director, Public Health Relations, BPH, WVDHHR
350 Capitol Street, Room 702
Charleston, WV 25301

Comments to the proposed 2005 FDA Model Food Code

Under the new code, the number of immediately uncorrectable critical violations necessary for closure being decreased from 5 to 3 is of concern. In Berkeley County, which presently has 600 food establishments, we would be closing someone every day. Even our "good" establishments often have 3 critical violations.

Due to staffing turnover, the majority of our food establishments are finally starting on a 6 month inspection rotation. Closures mean re-inspections which take time. Berkeley County is constantly growing and we receive several calls, each week, regarding another establishment wanting to open. Our concern is with being able to accomplish all we need to do, especially if there is a need to close more often.

BPH Response: This issue was debated in two different Food Safety and Food Security Task Force meetings. The issue was brought to the floor by a local Sanitarian. The issue was accepted by a consensus vote by the committee before being adopted as a proposed change. Food Establishments sign an application stating that they are willing to operate according to the standards that are set forth. An operation that continues to operate with critical violations is putting its consumers at risk for a foodborne illness.

4. Denny Taketa, R.S. July 19, 2007

Ann Spaner
Director, Public Health Relations, BPH
350 Capitol Street, Rm 702
Charleston, WV 25301

Re: Comments on Food Rule

Ms. Spaner

COMMENTS AND RESPONSES

WVDHHR, Bureau for Public Health 64CSR17, Food Establishments Rule

I would like to comment on the Food Rule as it relates to the equipment installed in various food establishments. There seems to be a belief "out there" that all new or heavily remodeled food establishments must install "commercial grade" equipment, i.e., refrigerators, freezers, stoves and exhaust hoods/fire suppressant systems.

I cannot find a specific regulation which points to a specific grade of equipment, except that such equipment should be designed and constructed by and ANSI accredited certification program deemed to comply with Parts 4-1 and 4-2 of the Food Code.

I feel that the type/grade of equipment should be based on the establishment's menu, how the food is cooked and possibly seating capacity. The important points are that the refrigerators/freezers are able to maintain their appropriate temperatures and that the hood/exhaust is adequate enough to pull off any grease vapors, smoke and excess heat. I know there are some other details involved, however I hope you understand my intent in trying to provide a clearer understanding of what type/grade of equipment is required in a food establishment.

BPH Response: Parts 4-1, 4-2 and 4-3 of the 2005 FDA Model Food Code provide the criteria for the materials, construction, repair, design, and numbers and capacities of food establishment equipment. You are correct, there are no specific criteria spelled out in the Rule to define what grade equipment must be used in a food establishment. All equipment used in a food establishment must comply with all of the requirements listed in these parts, as well as maintaining proper temperatures.

Section 4-205.10 of the Food Code provides an approval process for equipment which has been certified through an ANSI-accredited certification program. It does not require that all equipment used in a food establishment be certified.

5. Linda M. Jones July 25, 2007

Ann Spaner

As previous HHR Program Manager for the Office of Environmental Health Services' food program, I was responsible for promulgating the current 64CSR17 Food Establishment rule which incorporated by reference the majority of the federal 1999 Food Code. I am pleased that the department is proposing to update the rule to incorporate the federal 2005 Food Code and am glad to have the opportunity to submit my thoughts during the public comment period. My comments are as follows:

§ 64-17-4 Definition of Food Establishment

The reason for re-stating the definition of a food establishment in the rule is to make two changes to the definition provided in the Food Code. The first is stated in subdivision 4.1.f of the proposed rule which adds cooking demonstrations or instruction to the definition. The second is to replace subparagraph (3)(f) in the Food Code with

COMMENTS AND RESPONSES

WVDHHR, Bureau for Public Health 64CSR17, Food Establishments Rule

subdivision 4.2.f in the proposed rule in order to coincide with West Virginia's requirements for family day care homes. I do not believe it is the department's intent to change any other portions of the Food Code's definition of a food establishment. However, the rule as written drastically changes the meaning of a food establishment by the omission of a few words and the addition or deletion of commas. On page four (4) of these comments is a table with the definitions side-by-side for easy comparison.

First, the omission of "Such as" at the beginning of subdivision 4.1.b limits the definition to only those types of establishments listed therein. That list is intended to be examples and not self-limiting, intended to mean "including, but not limited to." As written, types of establishments not specifically listed in subdivision 4.1.b could claim exemption from the rule.

Second, and most critically, is the omission of the word "and" at the end of subdivision 4.1.b. The intent is to define an establishment as "an operation that stores, prepares, packages, serves, vends, or other provides food for human consumption" AND "that relinquishes possession of food to a consumer directly, or indirectly . . ." The food code is for retail food operations, not wholesale food operations, and the difference is relinquishing the food to a consumer. Warehouses, for example, are under the jurisdiction of the WV Department of Agriculture, and have always been exempt from the retail food rule. By removing the "and" as stated above, warehouses would be covered under the proposed rule, which I am sure is not the department's intent. Further, in any rule an "and" or an "or" is necessary and required when ending a list of items or subdivisions such as 4.1.a, 4.1.b, 4.1.c, 4.1.d, 4.1.e, and 4.1.f.

Third, and again most critically, the addition of commas to subdivision 4.1.d totally changes the meaning from that of the federal Food Code. When commas are placed before and after the phrase "such as transportation vehicles or central preparation facilities" those words will generally be interpreted as superfluous or simply explanatory and, therefore, unnecessary to the core meaning of that subdivision, which would then read as: "All elements of an operation that supply a vending location or satellite feeding location, unless . . ." The commas also separate a modifying phrase, "that supply a vending location or satellite feeding location," from the noun it was intended to modify which is "central preparation facilities," NOT both "transportation vehicles" and "central preparation facilities."

The intent of subparagraph (2)(a) in the Food Code's definition of food establishment is to include transportation vehicles and to also include central preparation facilities that supply a vending location or satellite feeding location. As written in the proposed rule, transportation vehicles would be only be covered by the rule if they supplied a vending location or satellite feeding location; this would exempt pizza delivery vehicles and Schwan's home delivery trucks.

Finally, why were singular terms in the Food Code changed to plural terms in the proposed rule, such as "An element" to "All elements," "vehicle" to "vehicles," and "facility" and "facilities?" I don't see the purpose for this change and it further confuses the meaning of this subdivision.

COMMENTS AND RESPONSES

**WVDHHR, Bureau for Public Health
64CSR17, Food Establishments Rule**

Fourth, subparagraphs (1), (1)(a), (1)(b), (2), (2)(a), and (2)(b) in the federal Food Code have been combined into equal subdivisions of subsection 4.1 in the proposed rule. Subparagraphs (1)(a) and (1)(b) are meant to clarify and further define the term “food establishment” in subparagraph (1). Changing their numbering to equal that of the term they are meant to clarify confuses the entire definition.

I suggest that the definition of “food establishment” in the federal 2005 Food Code be retained as is, including hierarchy and punctuation, except for the two necessary changes outlined above (subdivisions 4.1.f and 4.2.f of the proposed rule).

§64-17-4.1.f Cooking Demonstrations or Instruction

I oppose this subdivision as written. If a food operation does not relinquish possession of food to a consumer, as stated in the subdivision 4.1.c of the proposed rule, it does not meet the definition of a food establishment. Also, such an operation poses no risk since there is no “consumer.”

Cooking instruction classes have traditionally been exempted since the students are preparing their own food and are not serving outside consumers. This exemption has included home economic classes and classes designed to teach the developmentally disabled to be self-sufficient. The facilities in these classes are usually home-style and would not meet the requirements of the rule. Have there been any foodborne illness outbreaks or is there other public health evidence to justify the need to require these facilities to obtain a permit and meet the requirements of the rule?

Also, Pampered Chef parties are usually held in private homes; the instructor demonstrates a cooking procedure and the food she prepares is served to the attendees. Surely the department does not intend to include these parties in the definition of food establishment.

My opposition to this subdivision also extends to the Office of Environmental Health Services' Environmental Health Procedures Manual memorandum F-14, dated February 26, 2007. I don't believe the requirements of that memorandum are legal and in compliance with the current rule, and the section of that memorandum dealing with employee health is unclear and confusing.

§64-17-3.1.d Deletion of Paragraph 3-603.11(A) of 2005 Food Code

I believe there must be a typographical error here. Paragraph 3-603.11(A) of the 2005 Food Code is the requirement for a consumer advisory which means a food establishment must advise the consumer of the increased risk of consuming certain raw or undercooked foods. According to the “Brief Summary of Proposed Rule,” the department intended to adopt this section of the Food Code. However, subdivision 3.1.d of the proposed rule states that paragraph 3-603.11(A) shall not apply. Further, without paragraph 3-603.11(A) the remaining paragraphs of section 3-603.11 are meaningless. If this is a typographical error, what section or paragraph of the Food Code was intended to not apply, and will the public have an opportunity to comment on that proposal?

2005 Federal Food Code	64CSR17 - Proposed 2007 Rule
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COMMENTS AND RESPONSES

WVDHHR, Bureau for Public Health 64CSR17, Food Establishments Rule

<p>(1) "Food establishment" means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:</p> <p>(a) Such as a restaurant; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank; and</p> <p>(b) That relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.</p> <p>(2) "Food establishment" includes:</p> <p>(a) An element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location is permitted by the regulatory authority; and</p> <p>(b) An operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food.</p> <p>(3) "Food establishment" does not include:</p> <p>(a) An establishment that offers only prepackaged foods that are not potentially hazardous (time/temperature control for safety) foods;</p> <p>(b) A produce stand that only offers whole, uncut fresh fruits and vegetables;</p> <p>(c) A food processing plant;</p> <p>(d) A kitchen in a private home if only</p>	<p>4.1. Food Establishment. -- The following entities are considered to be "food establishments" in West Virginia for the purpose of compliance with this rule:</p> <p>4.1.a. An operation that stores, prepares, packages, serves, vends, or other provides food for human consumption.</p> <p>4.1.b. A restaurant; satellite or catered feeding location; catering operation, if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank;</p> <p>4.1.c. An entity that relinquishes possession of food to a consumer directly or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers;</p> <p>4.1.d. All elements of an operation, such as transportation vehicles or central preparation facilities, that supply a vending location or satellite feeding location, unless the vending or feeding location obtains a permit to operate in accordance with part 8-3 of the Food Code;</p> <p>4.1.e. An operation that is conducted in a mobile, stationary, temporary or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food;</p> <p>4.1.f. Facilities that offer cooking demonstrations or instruction, with or without student participation.</p> <p>4.2 Food establishments shall not include:</p> <p>4.2.a. An establishment that offers only prepackaged foods that are not potentially hazardous and does not provide reusable tableware to the consumer;</p> <p>4.2.b. A produce stand that only offers whole, uncut fresh fruits and vegetables;</p> <p>4.2.c. A food processing plant;</p> <p>4.2.d. A kitchen in a private home if</p>
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COMMENTS AND RESPONSES

**WVDHHR, Bureau for Public Health
64CSR17, Food Establishments Rule**

<p>food that is not potentially hazardous (time/temperature control for safety) food is prepared for sale or service at a function such as a religious or charitable organization's bake sale if allowed by law and if the consumer is informed by a clearly visible placard at the sales or service location that the food is prepared in a kitchen that is not subject to regulation and inspection by the regulatory authority;</p> <p>(e) An area where food that is prepared as specified in Subparagraph (3)(d) of this definition is sold or offered for human consumption;</p> <p>(f) A kitchen in a private home, such as a small family day-care provider; or a bed-and-breakfast operation that prepares and offers food to guests if the home is owner occupied, the number of available guest bedrooms does not exceed 6, breakfast is the only meal offered, the number of guests served does not exceed 18, and the consumer is informed by statements contained in published advertisements, mailed brochures, and placards posted at the registration area that the food is prepared in a kitchen that is not regulated and inspected by the regulatory authority; or</p> <p>(g) A private home that receives catered or home-delivered food.</p>	<p>only food that is not potentially hazardous is prepared for sale or service at a function such as a religious or charitable organization's bake sale and if the consumer is informed by a clearly visible placard at the sales or service location that the food is prepared in a kitchen that is not subject to regulation and inspection by the commissioner;</p> <p>4.2.e. An area where food that is prepared as specified in paragraph 4.2.d of this subdivision is sold or offered for human consumption;</p> <p>4.2.f. A kitchen in a family day care home; or</p> <p>4.2.g. A private home that received catered or home-delivered food.</p>
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BPH Response:

64-17-4 Definition of Food Establishment.

Subsection 4.1. should be rewritten to ensure the intent for the definition of a "food establishment" in the 2005 FDA Model Food Code is met in the proposed rule, as follows:

"4.1. Food establishment means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:

4.1.a. Such as a restaurant; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank; and

COMMENTS AND RESPONSES

WVDHHR, Bureau for Public Health 64CSR17, Food Establishments Rule

4.1.b. That relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers;

4.2 Food establishment includes:

4.2.a. An element of an operation such as transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location obtains a permit to operate in accordance with part 8-3 of the Food Code;

4.2.b. An operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food; and

4.2.c. Facilities that offer cooking demonstrations or instruction, with or without student participation, and the food is then consumed on or off premises.

4.3. Food establishments shall not include:

4.3.a. An establishment that offers only prepackaged foods that are not potentially hazardous and does not provide reusable tableware to the consumer;

4.3.b. A produce stand that only offers whole, uncut fresh fruits and vegetables;

4.3.c. A food processing plant;

4.3.d. A kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function such as a religious or charitable organization's bake sale and if the consumer is informed by a clearly visible placard at the sales or service location that the food is prepared in a kitchen that is not subject to regulation and inspection by the Commissioner;

4.3.e. An area where food that is prepared as specified in subdivision 4.3.d. of this subsection is sold or offered for human consumption;

4.3.f. A kitchen in a family child care home; or

4.3.g. A private home that receives catered or home-delivered food."

64-17-4.1.f Cooking Demonstrations or Instruction.

Subdivision 4.2.c. will be rewritten to reflect that facilities providing cooking demonstrations or instruction will meet the definition of food establishment when the food is to be consumed. However, private residences are specifically not included as food establishments in the Rule.

COMMENTS AND RESPONSES

WVDHHR, Bureau for Public Health 64CSR17, Food Establishments Rule

64-17-3.1.d Deletion of Paragraph 3-603.11(A) of 2005 Food Code.

In the proposed rule, subdivision 3.1.d. states: "In Chapter 3, paragraph 3-603.11(A) shall not apply." This is not correct and voids the inclusion of the consumer advisory.

Subdivision 3.1.d. should be modified as follows: "In Chapter 3, paragraph 3-603.11(A), the word "milk" shall be deleted."

FILED

TITLE 64
LEGISLATIVE RULE 2007 JUL 27 PM 5:09
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BUREAU FOR PUBLIC HEALTH OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

SERIES 17
FOOD ESTABLISHMENTS

§64-17-1. General.

1.1. Scope. -- This legislative rule establishes the minimum requirements for the design, construction, management and operation of food establishments.

1.2. Authority. -- West Virginia Code §§16-1-4 and 16-6-2.

1.3. Filing Date. -- .

1.4. Effective Date. -- .

1.5. Repeal and Replacement of Former Rules. -- This legislative rule repeals and replaces Division of Health rule, Food Establishments, 64CSR17, filed April 14, 2000, and effective July 1, 2000.

1.6. Applicability. -- This rule applies to the owners and operators of food establishments.

1.7. Enforcement. -- This rule is enforced by the commissioner of the Bureau for Public Health.

§64-17-2. Definitions.

2.1. Commissioner. -- commissioner of the Bureau for Public Health or his or her designee.

2.2. Family Child Care Facility. -- Any facility which is used to provide

nonresidential child care services for compensation for seven to twelve children, including children who are living in the household, who are under six years of age. No more than four of the total number of children may be under twenty-four months of age. A facility may be in a provider's residence or a separate building.

2.3. Family Child Care Home. -- A facility which is used to provide nonresidential child care services for compensation in a provider's residence. The provider may care for four to six children, at one time including children who are living in the household, who are under six years of age. No more than two of the total number of children may be under twenty-four months of age.

§64-17-3. Incorporation By Reference of Federal Model Food Code.

3.1. The Federal Food Code, also known as the 2005 Recommendations of the United States Public Health Service, Food and Drug Administration, (hereinafter referred to as the "Food Code") published by the U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, is incorporated by reference with the following exceptions:

3.1.a. In Chapter 1, the definition of "food establishment" in paragraph 1-

201.10(B) shall not be used for the purposes of this rule. In lieu thereof, the term "food establishment" shall be defined as in section 4 of this rule;

3.1.b. In Chapter 3, except 3-501.16(A)(2)(b) and subparagraph 3-501.17(A)(2);

3.1.c. In Chapter 3, paragraph 3-501.16(B) shall not be used for the purposes of this rule. The following shall apply: "Eggs that have not been treated to destroy all viable Salmonellae shall be stored in refrigerated equipment that maintains an ambient air temperature of 5 degrees Celsius (41 degrees Fahrenheit) or less.";

3.1.d. In Chapter 3, paragraph 3-603.11(A), the word "milk" shall be deleted;

3.1.e. In Chapter 3, subparagraph 3-603.11(C)(3) the following shall apply: "Consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness, especially for children, elderly, immunocompromised individuals, and persons with certain medical conditions.";

3.1.f. In Chapter 8, section 8-102.10, section 8-304.10, and paragraph 8-304.11(H) shall not apply;

3.1.g. In Chapter 8, section 8-201.11 shall include the following sentence after subsection C: "All required plans shall be submitted at least forty-five days prior to the start of construction, conversion, or remodeling.";

3.1.h. In Chapter 8, part 8-6, and subparts 8-805 through 8-813 of Annex 1 shall not apply; and

3.1.i. In Annex 1, section 8-804.10, shall include the following additional provision:

"The commissioner may also summarily suspend a permit to operate a food establishment if:

(A) The food establishment has three or more immediately uncorrectable critical items in violation at the time of inspection; or

(B) The permit holder has been determined by the commissioner to have obstructed or hindered the commissioner in the proper discharge of his or her duties; and

(C) Enforcement shall be in accordance with WV Code §16-1-1, et seq. and §16-6-1, et seq."

3.2. The commissioner shall use Annexes 2 through 7 of the Food Code in the interpretation and application of this rule.

3.3. The Food Code is available on the internet at: <http://vm.cfsan.fda.gov/~dms/foodcode.html> or as posted by the United States Food and Drug Administration.

§64-17-4. West Virginia Definition of Food Establishment.

4.1. Food establishment -- An operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:

4.1.a. Such as a restaurant; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank; and

4.1.b. That relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers;

4.2 Food establishment shall include:

4.2.a. An element of an operation such as transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location obtains a permit to operate in accordance with part 8-3 of the Food Code;

4.2.b. An operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food; and

4.2.c. An operation that offers cooking demonstrations or instruction, with or without student participation, and the food is then consumed on or off premises.

4.3. Food establishment shall not include:

4.3.a. An establishment that offers only prepackaged foods that are not potentially hazardous and does not provide reusable tableware to the consumer;

4.3.b. A produce stand that only offers whole, uncut fresh fruits and vegetables;

4.3.c. A food processing plant;

4.3.d. A kitchen in a private home if

only food that is not potentially hazardous is prepared for sale or service at a function such as a religious or charitable organization's bake sale and if the consumer is informed by a clearly visible placard at the sales or service location that the food is prepared in a kitchen that is not subject to regulation and inspection by the commissioner;

4.3.e. An area where food that is prepared as specified in subdivision 4.3.d. of this subsection is sold or offered for human consumption;

4.3.f. A kitchen in a family child care home; or

4.3.g. A private home that receives catered or home-delivered food.

§64-17-5. Modified Requirements for Specific Types of Food Establishments.

5.1. A domestic-type kitchen with residential-style equipment is acceptable in the following types of food establishments:

5.1.a. A family child care facility;

5.1.b. A boarding house or a residential care facility, such as a personal care home, a residential board and care facility, a group home, a halfway house, or a work release center, with a maximum capacity of twelve (12) occupants; and

5.1.c. A bed and breakfast inn that provides sleeping accommodations of six or fewer rooms, or that provides sleeping accommodations of more than six rooms if the entire inn or those rooms numbering above six are used on an aggregate of two weeks or less per year.

5.2. The food establishments identified in subdivisions 5.1.a., 5.1.b., and 5.1.c. of this section shall provide a sink in the kitchen with at least two compartments. Any mechanical warewashing machine utilized shall be capable of sanitizing. A separate lavatory located in the kitchen for hand washing is not required.

§64-17-6. Implementation.

6.1. Food establishments in operation at the time this rule becomes effective, and meeting all prior applicable rules, are considered eligible for a permit to operate provided that any construction done after the effective date of this rule is in compliance with this rule.

6.2. New or extensively remodeled food establishments whose plans and specifications received written approval from the commissioner prior to the effective date of this rule are eligible for a permit to operate provided that the construction or remodeling is in compliance with the approved plans.

6.3. Upon implementing this rule, the commissioner shall provide training for local health department personnel.

§64-17-7. Food Establishment Advisory Board.

7.1. The commissioner shall maintain an advisory board and shall serve as chairman.

7.2. The advisory board members shall include, but are not limited to, representatives of the Bureau for Public Health, local health departments, the retail food industry, restaurants, institutional food service providers, senior programs, convenience stores, and school lunch

programs.

7.3. The duties of the board shall include, but are not limited to, developing recommendations on:

7.3.a. Training;

7.3.b. Standardization of local health department personnel and programs;

7.3.c. Interpretations of the provisions of this rule;

7.3.d. Requests for waivers and variances;

7.3.e. Responding to complaints; and

7.3.f. Revisions of the rule, including bare-hand contact with ready-to-eat foods.

7.4. The board shall use Annexes 2 through 7 of the Food Code as guidelines in the performance of its duties.

§64-17-8. Fees.

All the fees established in the Bureau for Public Health rule, "Fees for Permits", 64CSR30, for a food service establishment, mobile food unit, a temporary food establishment, a retail food store, and a vending machine and others shall be applicable to establishments governed by this rule.

§64-17-9. Hearings and Administrative Due Process.

9.1. A permit applicant, a permit holder, an employee or other person may petition the commissioner in writing, as prescribed

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in the rule, "Rules of Procedure for Contested Case Hearings and Declaratory Rulings", 64CSR1, for a contested case hearing when the commissioner has:

9.1.a. Denied their application for a permit to operate;

9.1.b. Suspended or revoked their permit to operate;

9.1.c. Denied their request for a variance;

9.1.d. Issued a hold order;

9.1.e. Issued an employee restriction or exclusion order; or

9.1.f. Otherwise adversely affected the rights, duties, interests or privileges of the petitioner.

9.2. Within ten days after receipt of the written petition, the commissioner shall grant or deny a hearing on the matter in accordance with the rule, "Rules of Procedure for Contested Case Hearings and Declaratory Rulings" 64CSR1.

9.3. The filing of a petition for a hearing shall not stay or suspend the execution of the notice or order issued by the commissioner.

§64-17-10. Penalty for Violating Provisions of Rule.

10.1. Violation of the provisions of this rule is a misdemeanor. The commissioner may take enforcement actions for violation in accordance with WV Code §16-1-18, §16-6-23 and §16-6-24.