

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #6

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

Division of Health

AGENCY: Department of Health and Human Resources TITLE NUMBER: 64

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 17

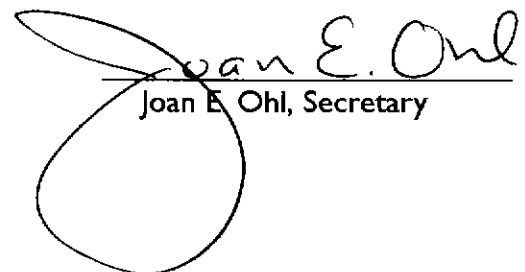
TITLE OF RULE BEING PROPOSED: Food Establishments

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) H.B. 4250

SECTION 64-5-2(c), PASSED ON March 10, 2000

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE
FOLLOWING DATE: July 1, 2000


Joan E. Ohl, Secretary

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES
RULE PROMULGATION HISTORY ABSTRACT**

Rule Title: 64 Food Establishments

Series Number: 17

Amendment of Existing Rule: ____ **New Rule:** X

Responsible Agency: Division of Health

Date Filed for Public Hearing or Comment Period: June 30, 1999

Date of Public Hearing (if any):

Date Public Comment Period Ended: July 30, 1999

**Date Agency-Approved Rule Filed with the
Legislative Rule-Making Review Committee:** August 4, 1999

**Date of Filing of Modified Rule as Approved by
the Legislative Rule-Making Review Committee:** January 20, 2000

Date of Final Filing: April 14, 2000

Effective Date: July 1, 2000

Authorized by: H. B. 4250 (With amendments? Yes X No ____),
Passed: March 10, 2000

Dates Emergency Rule in Effect (if any):

**TITLE 64
DIVISION OF HEALTH
LEGISLATIVE RULES**

**SERIES 17
FOOD ESTABLISHMENTS**

FINAL RULE

**TITLE 64
DIVISION OF HEALTH
LEGISLATIVE RULES**

**SERIES 17
FOOD ESTABLISHMENTS**

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§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. -- W. Va. Code §§ 16-1-7 and 16-6-2.

1.3. Filing Date. -- April 14, 2000.

1.4. Effective Date. -- July 1, 2000.

1.5. Repeal and Replacement of Former Rules. -- This legislative rule repeals and replaces Division of Health rule, "Food Service Sanitation Rules," 64CSR17, filed June 13, 1980 and effective August 1, 1980, and repeals Division of Health rule "Retail Food Store Sanitation," 64CSR20, filed April 22, 1992 and effective April 22, 1992.

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

1.7. Enforcement. -- This rule is enforced by the Director of the Division of Health.¹

§64-17-2. Incorporation By Reference of Federal Model Food Code.

2.1. The following portions of the Food Code, 1999 Recommendations of the United States Public Health Service, Food and Drug Administration as published by the U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, are incorporated by reference as the Food Code:

2.1.a. Chapter 1, except for the definition of "food establishment" in subparagraph 1-201.10(B)(31) and the definition of "whole-muscle, intact beef" in subparagraph 1-201.10(B)(94);

¹The Department of Health and Human Resources (DHHR) was created by the Legislature's reorganization of the executive branch of State government in 1989. The Department of Health was renamed the Division of Health and made a part of the DHHR (W. Va. Code § 5F-1-1 et seq.). Administratively within the DHHR the Bureau for Public Health through its Commissioner carries out the public health function of the Division of Health.

2.1.b. Chapter 2, except for paragraph 2-103.11(H), Persons In Charge;

2.1.c. Chapter 3, except for paragraphs 3-201.11(E), Compliance With Food Law, 3-301.11(B) and 3-301.11(C), Preventing Contamination From Hands; subparagraphs 3-401.11(C)(2) and 3-401.11(D)(2), Raw Animal Foods; subparagraph 3-501.16(C)(2), Potentially Hazardous Food, Hot and Cold Holding; and section 3-603.11, Consumption of Animal Foods that are Raw, Undercooked, or Not Otherwise Processed to Eliminate Pathogens and the word “intact” in subparagraphs 3-401.11(C) and 3-401.11(D).

2.1.c.1 The following shall be added to section 3-301.11: “Food shall be prepared with the least possible manual contact, with approved utensils, and on surfaces that prior to use have been cleaned, rinsed and sanitized to prevent cross-contamination.”

2.1.c.2. The following shall be added to paragraph 3-501.16(C): “Within seven (7) years of the effective date of this code, the equipment is upgraded or replaced to maintain food at a temperature of five degrees Centigrade (5° C), forty-one degrees Fahrenheit (41°F), or less.”

2.1.d. Chapter 4;

2.1.e. Chapter 5;

2.1.f. Chapter 6;

2.1.g. Chapter 7;

2.1.h. Chapter 8, except for section 8-102.10, Preventing Health Hazards, Provision for Conditions Not Addressed, and section 8-304.10, Responsibilities of the Regulatory Authority. The following shall be added to Chapter 8, section 8-201.11: “The permit applicant shall submit plans and specifications to the Director at least forty-five (45) days prior to the start of construction, conversion, or remodeling”; and

2.1.i. Annex 1, except for part 8-6 and subparts 8-805 through 8-813.

2.1.i.1. The following shall be added to Annex 1, section 8-804.10, Conditions Warranting Action: “The Director may also summarily suspend a permit to operate a food establishment if:

2.1.i.1.A. The food establishment has five (5) or more immediately uncorrectable critical items in violation at the time of inspection; or

2.1.i.1.B The permit holder has been determined by the Director to have obstructed or hindered the Director in the proper discharge of his or her duties.”

2.1.i.1.C. Enforcement of the above shall be in compliance with Chapter 16, Article 6 of the West Virginia Code.

2.2. The Director shall use annexes 2 through 7 of the Food Code in the interpretation and application of this rule.

2.3. The Food Code is available on the internet at:
<http://vm.cfsan.fda.gov/~dms/foodcode.html>.

§64-17-3. Definitions.

3.1. Director. -- Director of the Division of Health or his or her lawful designee.

3.2. Family Day Care Facility. -- A child care center which is used to provide nonresidential child care for seven (7) to twelve (12) children, including children who are living in the household who are less than (6) years of age.

3.3. Family Day Care Home. -- A facility which is used to provide nonresidential child care for less than seven (7) children, including children who are living in the household who are less than (6) years of age.

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

3.4.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

3.4.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.

3.4.c. Food establishment includes:

3.4.c.1. 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 obtains a permit to operate in accordance with section 3 of this rule; and

3.4.c.2. 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.

3.4.d. Food establishment does not include:

3.4.d.1. An establishment that offers only prepackaged foods that are not potentially hazardous and does not provide reusable tableware to the consumer;

3.4.d.2. A produce stand that only offers whole, uncut fresh fruits and vegetables;

3.4.d.3. A food processing plant;

3.4.d.4. 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 Director,

3.4.d.5. An area where food that is prepared as specified in paragraph 3.4.d.4 of this subdivision is sold or offered for human consumption;

3.4.d.6. A kitchen in a family day care home; or

3.4 d.7. A private home that receives catered or home-delivered food.

§64-17-4. Exceptions.

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

4.1.a. A family day care facility;

4.1.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

4.1.c. A bed and breakfast inn that provides sleeping accommodations of six (6) or fewer rooms, or that provides sleeping accommodations of more than six (6) rooms if the entire inn or those rooms numbering above six (6) are used on an aggregate of two (2) weeks or less per year.

4.2. The food establishments identified in subdivisions 4.1.a, 4.1.b, and 4.1.c of this section shall provide a sink in the kitchen with at least two (2) compartments. Any mechanical warewashing machine utilized shall be capable of sanitizing. A separate lavatory located in the kitchen for hand washing is not required.

§64-17-5. Implementation.

5.1. 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.

5.2. New or extensively remodeled food establishments whose plans and specifications received written approval from the Director 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.

5.3. Prior to July 1, 2001, the Director shall conduct the first inspection of an establishment under this rule as a courtesy inspection to advise and train the permit holder on the provisions of this rule. At the completion of the first inspection, the Director shall provide the permit holder with two (2) inspection reports: one (1) using the rating score system of subsection 5.4 of this section and one (1) using the inspection system of the 1999 Food Code. On subsequent inspections conducted prior to July 1, 2001, the Director need not complete an inspection report using the rating score system of subsection 5.4 of this section unless required for enforcement action.

5.4. Prior to July 1, 2001, the Director shall use the following rating score system for enforcement:

5.4.a. When the rating score of the establishment is 90 or more, all violations of 1- or 2-point weighted items shall be corrected by the time of the next routine inspection.

5.4.b. When the rating score of the establishment is 80 but not more than 89, all violations of 1- or 2-point weighted items shall be corrected within a specific period of time not to exceed thirty (30) days.

5.4.c. When the rating score of the establishment is at least 70 but not more than 79, all violations of 1- or 2-point weighted items shall be corrected within a specified period of time not to exceed ten (10) days.

5.4.d. All violations of 4- or 5-point weighted items shall be corrected within a specified period of time not to exceed ten (10) days following inspection.

5.4.e. When the rating score of the establishment is 69 or less, the permit shall be immediately suspended.

5.4.f. In the case of temporary food service establishments, all violations must be corrected within a specified period of time not to exceed 24 hours.

5.5. Before implementing this rule, the Director shall provide training courses for permit holders and local health department personnel.

§64-17-6. Food Establishment Advisory Board.

6.1. The Director shall establish an advisory board and shall serve as chairman.

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

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

6.3.a. Training;

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

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

6.3.d. Requests for waivers and variances;

6.3.e. Responding to complaints; and

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

6.4. The board shall use annexes two (2) through seven (7) of the 1999 Food Code as guidelines in the performance of its duties.

§64-17-7. Fees.

7.1. All the fees established in the Division of Health rule, "Fees for Permits," 64CSR30, for a mobile food unit, a temporary food establishment, a retail food store and a food service establishment, as those terms are defined in that rule, shall be applicable to those establishments governed by this rule.

§64-17-8. Hearings and Administrative Due Process.

8.1. A permit applicant, a permit holder, an employee or other person may petition the Director in writing, as prescribed in the Division of Health's rule, "Rules of Procedure for Contested Case Hearings and Declaratory Rulings," 64CSR1, for a contested case hearing when the Director has:

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

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

8.1.c Denied their request for a variance;

8.1.d. Issued a hold order;

8.1.e. Issued an employee restriction or exclusion order, or

8.1.f. Otherwise adversely affected their rights, duties, interests or privileges.

8.2. Within ten (10) days after receipt of the written petition, the Director shall grant or deny a hearing on the matter in accordance with the Division of Health's rule, "Rules of Procedure for Contested Case Hearings and Declaratory Rulings," 64CSR1.

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

§64-17-9. Penalty for Violating Provisions of Rule.

9.1. Any person who violates any provision of this rule is guilty of a misdemeanor. The Director shall enforce penalties in accordance with Chapter 16, Article 6.

1 (a) The legislative rule filed in the state register on the sixth
2 day of August, one thousand nine hundred ninety-nine, autho-
3 rized under the authority of section four, article two-d, chapter
4 sixteen, of this code, modified by the health care authority to
5 meet the objections of the legislative rule-making review
6 committee and refiled in the state register on the twenty-third
7 day of September, one thousand nine hundred ninety-nine,
8 relating to the health care authority (certificate of need, 65 CSR
9 7), is authorized.

10 (b) The legislative rule filed in the state register on the sixth
11 day of August, one thousand nine hundred ninety-nine, autho-
12 rized under the authority of section four, article two-d, chapter
13 sixteen, of this code, modified by the health care authority to
14 meet the objections of the legislative rule-making review
15 committee and refiled in the state register on the twenty-third
16 day of September, one thousand nine hundred ninety-nine,
17 relating to the health care authority (health services offered by
18 health professionals, 65 CSR 17), is authorized with the
19 following amendments:

20 "On page two, section three, subsection 3.2, following the
21 words 'regardless of the cost associated with the proposal', by
22 striking out the remainder of the sentence and inserting in lieu
23 there of 'unless cost is a factor for defining a diagnostic center
24 pursuant to subdivision 2.1.a of this rule.'"

§64-5-2. State board of health; division of health.

1 (a) The legislative rule filed in the state register on the sixth
2 day of August, one thousand nine hundred ninety-nine, autho-
3 rized under the authority of section one, article nine, chapter
4 twenty-seven, of this code, modified by the division of health
5 to meet the objections of the legislative rule-making review
6 committee and refiled in the state register on the twenty-ninth
7 day of December, one thousand nine hundred ninety-nine,