



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

7/26/2018 11:23:41 AM

Office of West Virginia
Secretary Of State

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

AGENCY: Health TITLE-SERIES: 64-17
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No
RULE NAME: 64-17 Food Establishments

PRIMARY CONTACT

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CITE STATUTORY AUTHORITY: W. Va. Code §§16-1-4 and 16-6-2

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

The current rule series has not been amended since 2008 and incorporates 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. In an effort to ensure the health and safety of the citizens of the state, the Bureau proposes to amend the rule to include the 2013 Food Code. Furthermore, a federal grant will soon expire and without these amendments the State will not be in compliance with FDA standards and consequently, it is unlikely that the grant may be renewed.

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/20/2018

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/20/2018

COMMENTS RECEIVED: Yes

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

N/A

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

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

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

The current rule series has not been amended since 2008 and incorporates 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. In an effort to ensure the health and safety of the citizens of the state, the Bureau proposes to amend the rule to include the 2013 Food Code. Furthermore, a federal grant will soon expire and without these amendments the State will not be in compliance with FDA standards and consequently, it is unlikely that the grant may be renewed.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

This legislative rule establishes the minimum requirements for the design, construction, management and operation of food establishments. The current rule series has not been amended since 2008 and incorporates 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. In an effort to ensure the health and safety of the citizens of the state, the Bureau proposes to amend the rule to include the 2013 Food Code. This rule will have no fiscal impact on the state.

B. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

N/A

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2018 Increase/Decrease (use "-")	2019 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0		0
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
2. Estimated Total Revenues	0		0

D. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

This rule will have no fiscal impact on the state.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Heather J Mcdaniel -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 64
LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BUREAU FOR PUBLIC HEALTH

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. -- W. Va. Code §§16-1-4 and 16-6-2.

1.3. Filing Date. -- ~~April 2, 2008.~~

1.4. Effective Date. -- ~~April 2, 2008.~~

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. Sunset Provision. -- This rule shall terminate and have no further force or effect upon the expiration of five years from its effective date.~~

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 lawful designee.

2.2. Family Child Care Facility. -- Any facility ~~which~~ that is used to provide nonresidential child care services for compensation for seven to ~~twelve~~ 12 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~~ 24 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~~ that 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~~ 24 months of age.

2.4. Retail Food Store - Any place, structure, premise, vehicle, or any part thereof in which food is sold retail, offered for retail sale, or served not to be consumed on the premises. The term "retail food store" does not include establishments that handle only prepacked, non-potentially hazardous foods; roadside markets that offer only fresh fruits or fresh vegetables; or the delicatessen operation of a retail food store.

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

3.1. The Federal Food Code, also known as the ~~2005~~ 2013 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" is defined 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);~~ The following shall be added to paragraph 2-102.12(A), "within one (1) year of the effective date of this rule.";

3.1.c. ~~In~~ Chapter 2, paragraph 2-102.12(B) may not be used for the purposes of this rule. The following applies: "This section does not apply to: (1) retail food facilities where only commercially prepackaged food is handled and sold, and (2) temporary food establishments.";

3.1.d. The following shall be added to Chapter 3, paragraph 3-501.16(A)(2) "Within five years of the effective date of this rule, the refrigeration equipment in a retail food store used to hold cut leafy greens shall be repaired, upgraded or replaced to maintain the cut leafy greens at a temperature of 5°C, (41°F) or less, if not already capable of maintaining the required temperature.";

3.1.e. ~~In~~ Chapter 3, paragraph 3-501.16(B) ~~shall~~ may not be used for the purposes of this rule. The following applies: "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)~~ 5°C, (41°F) or less.";

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

3.1.g. In Chapter 3, subparagraph 3-603.11(C)(3) the following applies: "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.h. ~~In~~ Chapter 8, section 8-102.10, and section 8-304.10, ~~and paragraph 8-304.11(H)~~ shall not apply;

3.1.gi. ~~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~~ 45 days prior to the start of construction, conversion, or remodeling.";

3.1.hj. ~~In~~ Chapter 8, part 8-6, and subparts ~~8-805~~ 8-905 through ~~8-813~~ 8-913 of Annex 1 shall not apply; and

3.1.ik. ~~In~~ Annex 1, section ~~8-804.10~~ 8-904.10, shall include the following additional provision:

~~3.1.ik.1.~~ The commissioner may also summarily suspend a permit to operate a food

establishment if:

~~3.1.k.1.A.~~ 3.1.k.1. The food establishment has three or more immediately uncorrectable ~~critical~~ priority items in violation at the time of inspection; or

~~3.1.k.1.B.~~ 3.1.k.2. 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

~~3.1.k.1.C.~~ 3.1.k.3. Enforcement shall be in accordance with *W. Va. 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> <http://www.fda.gov> 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 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. 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~~ does not include:

4.3.a. An establishment that offers only prepackaged foods that are not ~~potentially hazardous~~ time/temperature control for safety food 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 including those located on the premises of a food establishment;

4.3.d. A kitchen in a private home if:

4.3.d.1. Only The food that is prepared in a kitchen in a private home for sale or service at a function such as a religious or charitable organization's bake sale that is not potentially hazardous time/temperature control for safety food (formerly "potentially hazardous food" (PHF)) is prepared for sale or service at a function such as a religious or charitable organization's bake sale; and

4.3.d.2. 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 used 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~~ will maintain an advisory board and ~~shall~~ will 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 rules, “Fees for Permits,” 64 CSR 30 and “Fees for Service,” 64 CSR 51, for a food service establishment, mobile food unit, a temporary food establishment, a retail food store, ~~and~~ a vending machine and others are 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 in the rule, “Rules of Procedure for Contested Case Hearings and Declaratory Rulings”, 64 CSR 1, for a contested case hearing when the Commissioner has:

9.1.a. Denied his or her application for a permit to operate;

9.1.b. Suspended or revoked his or her permit to operate;

9.1.c. Denied his or her 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~~(10) 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," 64 CSR 1.

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 *W. Va. Code* §§16-1-18, 16-6-23 and 16-6-24.