

**WEST VIRGINIA
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Form #6

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

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

AMENDMENT TO AN EXISTING RULE: YES X 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 RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) SB 398

SECTION 64-5-1(a), PASSED ON March 8, 2008

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE
FOLLOWING DATE: April 2, 2008

Martha Yenger Walker
Authorized Signature

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

**SERIES 17
FOOD ESTABLISHMENTS**

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DEPT. OF HEALTH & HUMAN SERVICES
BUREAU OF PUBLIC HEALTH

§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. -- 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.

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" 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);

3.1.c. In Chapter 3, paragraph 3-501.16(B) shall 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) 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 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.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:

3.1.i.1. The Commissioner may also summarily suspend a permit to operate a food establishment if:

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

3.1.i.1.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

3.1.i.1.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 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 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 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 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 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", 64CSR1, 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 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.