

Report From Agency

DATCP Docket No. 07-R-05
Rules Clearinghouse No. 07-093

ORDER OF THE WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION ADOPTING RULES

2 The Wisconsin department of agriculture, trade and consumer protection hereby adopts
3 the following order *to repeal* ch. ATCP 74 and ATCP 75.01; *to renumber* ATCP 75.02
4 to 75.04; and *to create* ch. ATCP 75 subch. I, subch. II(title) and subch. III; *relating to*
5 local regulation of retail food establishments.

Analysis Prepared by the Department of Agriculture, Trade and Consumer Protection

This rule reorganizes, but does not substantially alter, current rules related to local health departments that regulate retail food establishments as “local agents” of the department of agriculture, trade and consumer protection (DATCP). For ease of reference, this rule moves the current “local agent” rules into the same chapter with other DATCP rules related to retail food establishments. This rule also makes minor technical changes in current “local agent” rules.

This rule does *not* do any of the following:

- Make any substantive changes in retail food establishment rules.
- Increase any fees for retail food establishments.
- Increase fees for “local agents,” unless those “local agents” fail to submit required annual self-assessments to DATCP (local agents that fail to submit timely self-assessments must pay additional fees). The self-assessments are an important part of a coordinated federal, state and local food safety program.

Statutes Interpreted

Statutes Interpreted: ss. 97.30 and 97.41, Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1), 97.30(5) and 97.41(2) and (5), Stats.

Explanation of Statutory Authority

DATCP has broad general authority under s. 93.07(1), Stats., to adopt rules to interpret and implement laws under its jurisdiction. Under s. 97.30, Stats., DATCP licenses and regulates retail food establishments, and under s. 97.30(5), DATCP may adopt rules for retail food establishments.

Under s. 97.41, Stats., DATCP may contract with “local agent” health departments to license and regulate retail food establishments for DATCP. Under s. 97.41(2) and (5), Stats., DATCP may adopt rules for this “local agent” program.

Background

DATCP currently licenses and inspects retail food establishments such as groceries, convenience stores and retail bakeries. DATCP may contract with local health departments (“local agents”) to license and inspect retail food establishments for DATCP. Local participation is voluntary. A local agent may set its own license fees, which may be higher (and typically *are* higher) than state fees. A retail food establishment licensed by a local agent does not need a license from DATCP.

The local agent program is growing. DATCP currently contracts with 36 local agents (there were 21 local agents in 2000). DATCP trains, monitors and assists local agent staff, establishes performance standards, and evaluates the consistency and adequacy of local performance.

Rule Contents

Reorganized Local Agent Rules

This rule reorganizes, but does not substantially alter, current rules related to local agent agreements between DATCP and local health departments. For ease of reference, this rule moves the local agent rules into the same chapter with other DATCP rules related to retail food establishments. This rule clarifies the current local agent rules and redrafts them to current technical drafting standards. This rule makes limited substantive changes to the current local agent rules, as noted below.

Local Agent Personnel; Credentials

Under current rules, local retail food inspections must be performed or supervised by public health sanitarians registered by the Wisconsin department of regulation and licensing. Under this rule, inspections may also be performed or supervised by environmental health specialists registered by the national environmental health association.

Reimbursement of DATCP Costs

Under current rules, local agents must pay DATCP a fee to reimburse DATCP for costs related to oversight of the local agent program. This fee is equal to 10% of the maximum license fee that DATCP could charge a retail food establishment licensed directly by DATCP (a local agent may set its own license fee, which usually is higher than the state license fee).

This rule does not change the local agent fee, as long as the local agent submits a timely annual self-assessment of its agent program. But under this rule, if the local agent fails to submit a timely self-assessment, the local agent fee increases to 20% of the license fee that DATCP would charge to a retail food establishment. This gives local agents a financial incentive to complete timely self-assessments, which are an important part of a coordinated federal, state and local food safety program. Timely local self-assessments reduce DATCP oversight costs.

Evaluation of Local Agents

Under current rules, DATCP must annually evaluate local agent performance. This rule changes the current evaluation standards and procedures, so that the evaluation will more closely conform to federal guidelines established by the United States food and drug administration (FDA). Under this rule, an annual evaluation may be based in part on a local agent self-assessment.

At least once every 3 years, DATCP must conduct an on-site evaluation to determine local compliance with applicable laws and rules. Under current rules, the 3-year evaluation must include a survey inspection of randomly selected retail food establishments. Under this rule, a 3-year evaluation may include, but is not required to include, a survey inspection of retail food establishments.

Under this rule, in lieu of performing its own 3-year evaluation, DATCP may accept an equivalent evaluation performed by the Wisconsin department of health services (DHS), which currently evaluates local agents that license and inspect restaurants for DHS. An agreement may also allow DATCP evaluation of DHS local agents, so that the 2 agencies can minimize duplication and maximize evaluation efficiency.

Technical Change

This rule clarifies, consistent with current law, that local agent contracts must be administered by local health departments.

Fiscal Impact

This rule will have no fiscal impact on state government. This rule will have no fiscal impact on and local governments that do not participate in DATCP's local agent program. Local agent participation is voluntary, not mandatory. Assuming that participating local agents submit timely self-assessments to DATCP, this rule will not increase local fees.

Business Impact

This rule will have no adverse impact on retail food establishments (many of which are small businesses). This rule will not increase retail food establishment costs, nor will it impose any additional compliance, recordkeeping or other requirements on retail food establishments.

Federal and Surrounding State Regulation

Federal Regulation

FDA has issued a Model Food Code for retail food establishments. However, FDA does few direct inspections of retail food establishments. Most retail inspections are performed by state or local governments. DATCP and DHS have adopted uniform rules for Wisconsin retail food establishments, based on the FDA Model Food Code. Local agents inspect for compliance with those rules. DATCP and DHS evaluate local agent performance based on FDA evaluation standards.

Surrounding State Regulation

Michigan

Michigan does not contract with local governments to conduct inspections.

Minnesota

Minnesota contracts with a few local health agencies to conduct retail food inspections. Minnesota evaluates local agents according to FDA standards.

Illinois

Illinois delegates all retail food licensing and inspection authority to local government. Illinois evaluates local agents according to FDA standards.

Iowa

Iowa contracts with local government to license and inspect retail food establishments. Iowa does not routinely evaluate local agents but does perform occasional audits. When Iowa does review local agents, it does so according to FDA standards.

Agency Contact

Questions related to this rule may be sent to the following address:

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1 **SECTION 1.** Chapter ATCP 74 is repealed.

2 **SECTION 2.** ATCP 75.01 is repealed.

3 **SECTION 3.** ATCP 75.02 to 75.04 are renumbered 75.03 to 75.05.

4 **SECTION 4.** Chapter ATCP 75 subchapter I is created to read:

5 **Subchapter I**
6 **DEFINITIONS AND GENERAL PROVISIONS**

7
8 **ATCP 75.01 Definitions.** In this chapter:

9 (1) “Agent agreement” means a written agreement between the department and a
10 local health department, under which the department authorizes the local health
11 department to administer a retail food program as the department’s local agent.

12 (2) “Department” means the Wisconsin department of agriculture, trade and
13 consumer protection.

14 (3) “Food” has the meaning given in s. 97.01(2), Stats.

15 (4) “Local agent” means a local health department that enters into an agent
16 agreement with the department to administer a retail food program.

17 (5) “Local health department” has the meaning given in s. 250.01(4), Stats.

18 **NOTE:** See s. 97.41(1)(b), Stats.

1 (6) “Registered public health sanitarian” means an individual who is registered
2 under s. 440.98, Stats., or is recognized as a “registered environmental health
3 specialist/registered sanitarian” by the national environmental health association.

4 (7) “Retail food establishment” has the meaning given in s. 97.30(1)(c), Stats.

5 (8) “Retail food program” means a program administered by a local agent
6 pursuant to subchapter III.

7 **ATCP 75.02 Authority, scope and purpose.** (1) The department licenses and
8 regulates retail food establishments under s. 97.30, Stats. Under s. 97.41, Stats., the
9 department may authorize local health departments to license and regulate retail food
10 establishments as local agents of the department.

11 (2) The department has adopted this chapter under authority provided in ss.
12 93.07(1), 97.30(5), 97.41(2) and (5), and 227.14(1s), Stats.

13 (3) Subchapter II describes retail food establishment licensing requirements and
14 procedures, and establishes food safety standards for retail food establishments. A retail
15 food establishment must comply with the model food code appended to this chapter.
16 Pursuant to s. 227.14(1s), Stats., the department has adopted the model food code in the
17 format published by the United States food and drug administration.

18 (4) Subchapter III describes the standards and procedures under which the
19 department may authorize a local health department to license and inspect retail food
20 establishments as the department’s local agent.

21 **SECTION 5.** Chapter ATCP 75 subchapter II(title), inserted between ss. ATCP
22 75.02 and 75.03, is created to read:

23
24

1 5. Exercise other authority delegated by the department under s. 97.41, Stats., and
2 the agent agreement.

3 **NOTE:** Paragraph (a) does not limit a local health department's authority to do
4 any of the following:

- 5
- 6 • Enforce additional local ordinance requirements related to retail food
- 7 establishments.
- 8 • Regulate restaurants, hotels or vending machine commissaries
- 9 pursuant to an agreement with the Wisconsin department of health
- 10 services under s. 254.69, Stats.
- 11

12 (b) An agent agreement takes effect on the date specified in the agreement, and
13 continues in effect until terminated by the local agent or the department. During the term
14 of the agreement, the department may not perform in the local jurisdiction any of the
15 activities that the local agent agrees to perform under the agreement, except as provided
16 in s. 97.41(8), Stats., or the agent agreement.

17 (c) Upon request by a local agent, or as provided in the agent agreement, the
18 department may assist the local agent in an inspection, investigation, enforcement action,
19 plan review or other activity under the agent agreement.

20 **(2) LOCAL APPLICATION FOR AGREEMENT.** A local health department that wishes
21 to enter into an agent agreement shall submit a written application to the department, in a
22 form specified by the department. The application shall include a complete plan for the
23 retail food program that the local health department proposes to implement under the
24 agreement. The plan shall include all of the following:

25 (a) The proposed coverage of the program.

26 (b) The functions that the local health department proposes to perform under the
27 program.

1 (c) Projected local staffing and budget for the program, including staffing and
2 budget for inspection and enforcement.

3 (d) The entities that the local health department proposes to license under the
4 program, and the approximate license fees that the local health department proposes to
5 charge.

6 **NOTE:** A local ordinance may combine and expand license categories, as long as
7 those categories include all of the retail food establishments that are
8 required to be licensed under s. ATCP 75.03 and the agent agreement. A
9 local ordinance may establish local license fees that differ from the fees
10 charged under s. ATCP 75.03(3) for licenses issued by the department.
11 However, license fees must be based on the local agent's reasonable
12 program costs. See sub. (4)(c) and s. 97.41(4), Stats.
13

14 (e) A description of the proposed licensing and recordkeeping system that the
15 local health department proposes to maintain under the program.

16 (f) A description of the proposed inspection and enforcement program that the
17 local health department proposes to implement under the program.

18 (g) Proposed procedures for coordinating with federal, state and local agencies in
19 the event of an emergency or disaster.

20 (h) The procedures that the local health department will use to grant or deny retail
21 food establishment license applications, and the time periods within which the local
22 health department will grant or deny a complete application. Procedures and time periods
23 shall be consistent with those provided in s. ATCP 75.03(5) to (7).

24 (i) Reasonable assurance that the local health department will provide continuing
25 adequate funding and other support for the program.

26 (j) Other information, required by the department, which is reasonably necessary
27 or relevant to the department's review of the application.

1 **(3) DEPARTMENT ACTION ON LOCAL APPLICATION.** The department shall grant or
2 deny an application under sub. (2) within 60 days after the department receives a
3 complete application.

4 **(4) AGREEMENT TERMS AND CONDITIONS.** (a) An agent agreement shall do all of
5 the following:

6 1. Clearly describe the retail food licensing program that the local agent agrees to
7 implement. The program shall comply with applicable requirements under this chapter.

8 2. Provide for full and adequate enforcement of subch. II and other laws
9 identified in the agreement.

10 (b) An agent agreement may incorporate, by reference, information contained in
11 the application under sub. (2).

12 (c) Retail food establishment license fees charged by a local agent may exceed
13 the amounts specified in s. ATCP 75.03(3), but the amount of license fees collected less
14 the amount paid to the department under s. ATCP 75.11(2) may not exceed an amount
15 reasonably required to cover the local agent's program costs under s. ATCP 75.10(2).

16 **NOTE:** See s. 97.41(4), Stats.

17 **(5) REVIEW AND EVALUATION.** The department shall periodically review and
18 evaluate a local agent's implementation of an agent agreement, as provided in s. ATCP
19 75.12.

20 **(6) AMENDMENTS.** An agent agreement may be amended at any time, by
21 agreement of the parties.

22 **(7) TERMINATION BY LOCAL AGENT.** A local agent may terminate an agent
23 agreement by giving 90 days prior written notice to the department.

1 **(8) TERMINATION BY DEPARTMENT.** (a) If the department finds that a local agent
2 has failed to comply with the terms of the agent agreement, the department may by
3 written notice terminate the agreement. The termination notice shall specify the
4 termination date and reasons for termination.

5 (b) A notice under par. (a) may terminate an agent agreement immediately,
6 without prior notice, if the department finds that immediate termination is necessary in an
7 emergency to protect the public health, safety or welfare.

8 (c) The department may issue a warning notice to a local agent, stating that the
9 department may terminate an agent agreement if the local agent fails by a specified date
10 to correct deficiencies identified in the warning notice.

11 **ATCP 75.07 Local agent staff. (1) STAFF NUMBERS; QUALIFICATIONS AND**
12 **EQUIPMENT.** A local agent shall employ adequate staff to implement the retail food
13 program described in the agent agreement. One or more registered public health
14 sanitarians, employed by the local agent, shall perform or directly supervise all retail food
15 establishment inspections under the program. The local agent shall provide appropriate
16 equipment to inspection personnel, as provided in the agent agreement.

17 **(2) TRAINING IN STANDARD PROCEDURES.** The department shall train one or more
18 registered public health sanitarians employed by each local agent, so that the sanitarians
19 can apply standard inspection procedures prescribed by the department and if necessary
20 teach those procedures to other inspectors employed by the local agent. The department
21 shall evaluate its trainees, to ensure that they understand and can apply and teach the
22 standard inspection procedures. The department may, from time to time, update standard
23 inspection procedures.

1 **(3) DEPARTMENT ASSUMES NO LIABILITY.** The department assumes no liability
2 for the job safety or welfare of a local agent’s employees, or for the actions or omissions
3 of the local agent’s employees, except as otherwise provided by law.

4 **ATCP 75.08 Inspections. (1) GENERAL.** A local agent shall inspect retail food
5 establishments for compliance with subch. II and other laws identified in the agent
6 agreement. A local agent shall use standard inspection procedures that the department
7 may, from time to time, prescribe.

8 **(2) LICENSED RETAIL FOOD ESTABLISHMENTS; INSPECTION FREQUENCY AND**
9 **SCOPE.** A local agent shall conduct at least one unannounced inspection per year at each
10 licensed retail food establishment, unless the agent agreement specifies a different
11 inspection frequency. The inspection shall evaluate all of the following, subject to the
12 terms of the agent agreement:

13 (a) License status and overall sanitation.

14 (b) Food sources, transportation and storage.

15 (c) Food preparation, holding and display, including temperature control if
16 applicable.

17 (d) Equipment and utensils, including storage procedures.

18 (e) Cleaning and sanitizing procedures.

19 (f) Waste disposal.

20 (g) Insect and rodent control.

21 (h) Personal hygiene.

22 (i) Lighting, ventilation and water temperature.

23 (j) Other matters identified in the agent agreement.

1 **(3) INSPECTION-RELATED TASKS.** A local agent shall do all of the following as
2 part of an inspection under this section:

3 (a) Collect food and water samples as necessary.

4 (b) Prepare an inspection report that identifies law violations, if any, and
5 specifies correction deadlines. The inspector shall use an inspection report form
6 approved by the department. The inspector shall provide a copy of the inspection report
7 to the operator of the retail food establishment. If possible, the inspector shall discuss the
8 report with the operator and obtain a receipt acknowledgment from the operator.

9 (c) Conduct timely re-inspections, as necessary, to determine whether violations
10 have been corrected.

11 **ATCP 75.09 Complaint investigations. (1) GENERAL.** Except as provided in
12 sub. (2), a local agent shall investigate every food-related complaint that it receives
13 against a retail food establishment under its jurisdiction. The local agent shall prioritize
14 and investigate complaints according to established complaint handling and investigation
15 procedures. The following types of complaints shall be treated in descending order of
16 priority:

17 (a) If a complaint alleges facts that indicate a serious or imminent public health
18 hazard, the local agent shall investigate immediately.

19 (b) If a complaint alleges facts that indicate a potential public health problem, but
20 not a serious or imminent public health hazard, the local agent shall investigate as soon as
21 practicable.

22 (c) If a complaint has no public health significance, the local agent may
23 investigate the complaint when time permits.

1 **(2) COORDINATION WITH OTHER AGENCIES.** A local agent shall notify and consult
2 with the department and other affected agencies having jurisdiction, as necessary, related
3 to complaints that may be of significant concern to those agencies. A local agent shall
4 coordinate complaint investigations, as necessary, with other agencies having
5 jurisdiction.

6 **ATCP 75.10 Records and reports. (1) GENERAL.** (a) A local agent shall keep
7 complete and accurate records of its activities under an agent agreement, including
8 complete and accurate records of all licenses and license holders, license fee revenues,
9 inspections, complaints, investigations, enforcement actions and program costs.

10 (b) A local agent shall retain a copy of each record, in electronic or hard copy
11 form, for at least 3 years.

12 (c) Upon termination of an agent agreement, a local agent shall file with the
13 department copies of records that are relevant to the local agent agreement or the
14 regulation of retail food establishments.

15 **(2) COST DOCUMENTATION.** A local agent shall document the cost of the retail
16 food program that it administers under the agent agreement. The cost may include direct
17 costs for licensing, inspection, complaint handling, investigation, enforcement,
18 information management, reporting and other activities under the program, as well as
19 indirect costs reasonably allocated to the program. Costs may include staff, equipment,
20 facility, contract service and other costs reasonably allocated to the program.

21 **(3) REPORTS TO THE DEPARTMENT.** (a) A local agent shall report information to
22 the department upon request, and shall make information available to the department for
23 inspection and copying upon request.

1 (b) A local agent shall file a monthly report with the department, by the 10th day
2 of each month. The report shall identify all of the following:

- 3 1. All retail food establishments newly licensed during the preceding month.
- 4 2. All changes in the license status of retail food establishments during the
5 preceding month.

6 (c) A local agent shall promptly notify the department, in writing, whenever the
7 local agent takes formal enforcement action against a retail food establishment. A formal
8 enforcement action includes a court complaint, an enforceable administrative order, or an
9 action to suspend or revoke a license, but does not include a warning notice. The local
10 agent shall include, with its notice to the department, a copy of the relevant court
11 complaint, administrative order or license action.

12 **ATCP 75.11 Reimbursement of department costs. (1) FISCAL YEAR.** The
13 fiscal year under an agent agreement begins on July 1 and ends on June 30, except as
14 otherwise provided in the agent agreement.

15 **(2) PAYMENT TO DEPARTMENT.** By September 30 of each year, a local agent shall
16 pay to the department, for each retail food establishment licensed by the local agent
17 during the preceding fiscal year, the following applicable fee:

18 (a) A fee equal to 10% of the license fee provided in s. ATCP 75.03(3),
19 regardless of the license fee actually charged by the local agent, if the local agent
20 prepares and submits to the department by September 30 of that year an annual self-
21 assessment as required by s. ATCP 75.12(1).

22 (b) A fee equal to 20% of the license fee provided in s. ATCP 75.03(3),
23 regardless of the license fee actually charged by the local agent, if the local agent fails to

1 submit to the department by September 30 of that year an annual self-assessment as
2 required by s. ATCP 75.12(1). A fee payment under this paragraph does not exempt the
3 local agent from the duty to prepare and submit an annual self-assessment.

4 **ATCP 75.12 Review and evaluation. (1) ANNUAL EVALUATION.** At least once
5 each year, the department shall review and evaluate a local agent's implementation of its
6 agent agreement with the department, and the local agent shall submit a self-assessment
7 in a format determined by the department. The department's review and evaluation may
8 be based, in part, upon the self-assessment and may include all of the following:

9 (a) The terms of the agent agreement, and a renegotiation of terms if necessary.

10 (b) Local agent compliance with the terms of the agreement.

11 (c) Local agent records and reports under ATCP 75.10.

12 (d) Local agent procedures, including licensing, inspection, complaint handling,
13 investigation and enforcement procedures.

14 (e) Local agent costs, license revenues, license fees and related accounting and
15 financial management.

16 **NOTE:** The evaluation under sub. (1) will normally be patterned, in part, after
17 evaluation procedures outlined in the "Voluntary National Retail Food
18 Regulatory Program Standards" issued by the United States food and drug
19 administration.

20
21 **(2) THREE-YEAR ON-SITE EVALUATION.** At least once every 3 years, the
22 department shall conduct an on-site evaluation of a local agent's retail food program.
23 The department shall evaluate the program for compliance with this chapter and the agent
24 agreement. The department may, as part of its evaluation, conduct survey inspections of
25 retail food establishments licensed by the local agent. In lieu of conducting its own
26 evaluation, the department may accept an equivalent evaluation conducted by the

1 Wisconsin department of health services pursuant to a cooperative agreement with that
2 department under s. 93.06(11), Stats.

3 **EFFECTIVE DATE.** This rule takes effect on the first day of the month following
4 publication in the Wisconsin administrative register, as provided in s. 227.22(2)(intro.),
5 Stats.

Dated this _____ day of November, 2008.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE
AND CONSUMER PROTECTION

By _____
Rodney J. Nilsestuen, Secretary