

Wisconsin Department of Agriculture, Trade and Consumer Protection

Final Regulatory Flexibility Analysis

Rule Subject: Emergency Rule Affecting ATCP 75, Licensing Bases of Mobile Retail Operations
Adm. Code Reference: ATCP 75
Rules Clearinghouse #: N/A
DATCP Docket #: 16 – R - 02

Rule Summary

Law prior to July 1, 2016, assigns DHS and the DATCP shared regulatory authority over food safety. Under ch. DHS 196, DHS regulates food safety in restaurants and mobile restaurants. Under ch. ATCP 75, DATCP regulates food safety in retail food establishments such as grocery stores, supermarkets, mobile retail food establishments, and most convenience stores. Both DHS 196 and ATCP 75 have a common appendix, known as *The Wisconsin Food Code*. The two agencies have shared *The Wisconsin Food Code* since 1999. Effective July 1, 2016, 2015 Wisconsin Act 55 transfers regulatory authority over food safety in restaurants from DHS to DATCP. The statutes effective on that date will categorize restaurants as a type of retail food establishment under the DATCP's jurisdiction. However, the term restaurant will be used throughout this document to describe an establishment serving meals. Despite DHS and DATCP sharing a common food code, differences between DHS 196 and ATCP 75 have resulted in different, agency-specific regulation of the bases supporting mobile restaurants and mobile retail food establishments, respectively. DHS requires the base supporting a mobile restaurant to be appropriately licensed and inspected, while DATCP has not had such a requirement for the base supporting a mobile retail food establishment.

The difference in licensing status, between bases supporting mobile retail food establishments and bases supporting mobile restaurants, cannot be eliminated at this time without the proposed emergency rule. If DATCP is not able to take this action now, the resulting inequality in licensing and inspection status will delay implementation of the legislative mandate to work toward a simplified and streamlined regulatory system for Wisconsin's food industry. The proposed emergency rule will allow DATCP to extend a licensing requirement to bases serving mobile retail food establishments and provide inspection services to those bases. This will create equal regulatory treatment of all bases serving mobile food businesses and decrease the likelihood of foodborne illness caused by deficiencies in facility or practice occurring at a base associated with a mobile retail food establishment.

- In many cases, the business serving as a mobile retail food establishment base may already be licensed and inspected as a food processing plant or other food business.
- In this case, no additional license or fee will be required.

Consolidation with DATCP's Division of Food Safety

The transfer of the DHS's Food Safety and Recreational Licensing unit to the Department's Division of Food and Recreational Safety (DFRS) will improve services for Wisconsin's food and recreational industries. It will create a "one-stop" contact point for operators of restaurants and retail food establishments, making it much easier for them to quickly get licensed and have their questions answered. In the spirit of consistent and efficient service, this proposed emergency rule revision will facilitate consistent oversight of mobile restaurants and other mobile retail food establishments in Wisconsin. Retail food establishments and restaurants are already regulated under the same *Wisconsin Food Code*. Having one agency interpret *The Wisconsin Food Code* and use one set of regulations will simplify compliance for industry by facilitating interpretive and regulatory consistency.

Rule Change.

DHS 196 currently allows DHS to license and regulate the bases for mobile restaurant operations. The standards for these operations are set forth in *The Wisconsin Food Code*, Chapter 9. The need for an emergency rule arose because current provisions in ATCP 75 do not address bases for mobile retail food establishments or allow DATCP to license and regulate them. One goal of the proposed, post-merger changes to ATCP 75 is to insert clear and equitable language mandating licensed bases for both mobile retail food establishments and mobile restaurants.

Policy Alternative.

Do nothing. If the Department had done nothing, then the mobile restaurant operators would have been treated differently from mobile retail food establishment operators. The rules carried over from DHS mandates that a business serving as a base for a mobile restaurant must buy a license while that requirement does not apply to a base supporting a mobile retail food establishment. Effectively, the licensed mobile restaurant bases would have had to adhere to standards that did not apply to bases for mobile retail food establishments. This disparity would have delayed implementation of a simplified, streamlined regulatory system for Wisconsin's retail food industry.

Small Businesses Affected

The rule does not have an effect on all retail food establishments.

- Those already licensed as mobile restaurants will not be affected since their bases have the requisite license under the rules of DHS.
- Mobile retail food establishments that operate at special events or temporary events will not need this license.
- Mobile restaurants operating at temporary events such as farmers' markets currently do not need it.

For those operators of bases serving mobile retail food establishments that only sell non-perishable, packaged foods, the effect will also be minimal. *The only operators who may find the regulations more involved, and the expense to meet them greater, are those operators who are also doing complex processing and preparation of food destined for other sales channels besides mobile retail food establishments.* In this situation, the base must hold the appropriate license for the additional activity or activities performed, and may already do so, instead of the mobile retail food establishment base license. Possible licenses include a food processing plant license under ATCP 70, a dairy plant license under ATCP 65, and a food warehouse license under ATCP 71. Some activities performed in those settings must also be done under the Hazard Analysis Critical Control Point (HACCP) system, such as fish processing that would require Seafood HACCP (21 CFR part 123, as cited in s. ATCP 70.18), Juice Processing that would require Juice HACCP (21 CFR part 120, as cited in s. ATCP 70.23), or the processing and/or repacking of Molluscan Shellfish that would require compliance with the HACCP-based Molluscan Shellfish Program found in s. ATCP 70.21.

Reporting, Bookkeeping and other Procedures

The proposed rule may necessitate the purchase of new license. That should not create any new reporting, bookkeeping or other procedures for small businesses. The tracking of licenses issued, needing renewals, and the associated notifications and billing are done by DATCP.

Professional Skills Required

The proposed rule does not require any new professional skills by small businesses.

Accommodation for Small Business

Many of the businesses affected by this rule are “small businesses.” For the most part, this rule does not make special exceptions for “small businesses”. The license required under this emergency rule is a flat-fee regardless of type needed or size of business.

Conclusion

This rule will not have a significant adverse effect on “small business,” and is not subject to the delayed “small business” effective date provided in s. 227.22(2)(e), Stats.

DATCP will, to the maximum extent feasible, seek voluntary compliance with this rule.

Dated this _____ day of _____, 2016.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Steve Ingham, Administrator,
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Department of Agriculture, Trade, and
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