

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

EMERGENCY RULE
Chapter ATCP 75

The Wisconsin Department of Agriculture, Trade and Consumer protection hereby adopts the following emergency rule *to amend* ss. ATCP 75.03 (1), and ATCP 75.03 (3) (d); and *to create* subs. ATCP 75.01 (5m) and (9) and 75.03 (9) (i), relating to mobile retail food establishments and the bases that support those mobile retail establishments and affecting small businesses.

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

This emergency rule allows the Wisconsin Department of Agriculture, Trade, and Consumer Protection (“Department”) to, immediately upon publication, evaluate the bases supporting mobile retail food establishments and require licensing of the bases according to the food storage, processing, and preparation activities they perform. This will result in the immediate equalization of inspection and enforcement between the Department’s Division of Food Safety (“DFS”), which does not currently require licensing of the bases serving mobile retail food establishments under its jurisdiction, and the Wisconsin Department of Health Services (“DHS”) Food Safety and Recreational Licensing unit (“FSRL”), which currently requires licensing of the bases serving mobile restaurants under its jurisdiction. Mobile retail food establishments and mobile restaurants perform very similar food-preparation and -handling functions, differing mainly in whether they serve a “meal”. If this rule were not to be implemented, the result would be unequal inspection and enforcement – an unacceptable situation when both types of businesses will be regulated by DFS after the transfer of FSRL to DFS on July 1, 2016.

The emergency rule will take immediate effect upon publication in the state newspaper and remain in effect for 150 days. The legislature’s joint committee for review of administrative rules may extend the emergency rule for up to 120 additional days.

Under an already-approved scope statement, DFS will promulgate a new ATCP 75 after the merger with FSRL on July 1, 2016, and make the language in the emergency rule permanent.

Statutes Interpreted

Statutes interpreted: ss. 97.29 (2) (a) and 97.30 (2) (a), Wis. Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1), 97.09 (4), 97.29 (2) (a), 97.29 (5), 97.30 (2) (a), 97.30 (5), and 227.24, Wis. Stats.

Explanation of Statutory Authority

The Department has broad statutory authority under s. 93.07 (1), Stats., to interpret laws under its jurisdiction. The Department has specific authority under ss. 97.29(2) (a) and 97.30(2) (a) to require licenses, and the information required in the application for licenses, for businesses processing and retailing food. The Department has specific authority under ss. 97.09 (4), 97.29(5) and 97.30 (5), Stats., to write rules for businesses processing and retailing food. The Department is adopting this temporary emergency rule under the authority of s. 227.24, Wis. Stats.

Related Rules or Statutes

DHS has prepared and gained approval for three scope statements to facilitate the transfer of the Food Safety and Recreational Licensing Unit regulations to the Department's Division of Food Safety. One approved scope statement calls for revision of DHS 196 (Restaurants) and DHS 196 Appendix (Wisconsin Food Code), which will be consolidated with ATCP 75 on July 1, 2016. The goal of the rulemaking activity under this scope statement will be to start working with restaurant owners and other stakeholders to update the Wisconsin Food Code.

This emergency rule will allow equal enforcement when DHS rules are transferred to the Department in their current form. The provisions of the emergency rule will be carried over in permanent form when the Department repeals the merged rule and re-creates a new, post-merger ATCP 75.

Plain Language Analysis

History and Background

Current law assigns DHS and the Department shared regulatory authority over food safety. Under ch. DHS 196, DHS regulates food safety in restaurants and mobile restaurants. Under ch. ATCP 75, the Department 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 the Department. The statutes effective on that date will categorize restaurants as a type of retail food establishment under the Department's jurisdiction. However, the term restaurant will be used throughout this document to describe an establishment serving meals. Despite DHS and the Department 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 the Department 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 the Department 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 the Department 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 Department Division of Food Safety

The transfer of the DHS's Food Safety and Recreational Licensing unit to the Department's Division of Food Safety 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 arises because current provisions in ATCP 75 do not address bases for mobile retail food establishments or allow the Department to license and regulate them. One intent 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 does nothing, then the mobile restaurant operators will be treated differently from mobile retail food establishment operators. The rules carried over from DHS will mandate that a business serving as a base for a mobile restaurant must buy a license while that requirement will not apply to a base supporting a mobile retail food establishment. Effectively, the licensed mobile restaurant bases will have to adhere to standards that will not

apply to bases for mobile retail food establishments. This disparity will delay implementation of a simplified, streamlined regulatory system for Wisconsin's retail food industry.

Fiscal Impact

This emergency rule is not expected to have any major economic impact. It will clarify the existing rules while preventing unequal requirements being placed on entities that operate in a very similar fashion under the same code. By implementing equally-enforced licensing and food safety provisions, the proposed emergency rule will ensure Wisconsin's food regulations uniformly impose provisions for protecting public health. This emergency rule and the permanent rules that will be promulgated to amend the existing rule will be part of the larger initiative to consolidate and streamline Wisconsin's food safety programs. It will result in the removal of confusing inconsistency in regulatory requirements and ensure consistent application of retail food establishment regulations, regardless of whether the business serves meals and is a restaurant.

The emergency rule is not cost-neutral – license fees for some retail food establishment bases may increase - but it will achieve industry-wide equity in the mobile category because it mandates a license for a portion of the mobile retail food establishment operation (the base) that is already required for mobile restaurant bases. An increase in cost for a mobile retail food establishment base will be matched by service from the Department in food safety inspections at the locations where the mobile retail food establishments are cleaned, sanitized, provisioned, and stored. 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 fee will be required.

Effect on Small Business

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 just as 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.

Federal and Surrounding State Programs

The FDA does not directly regulate retail food safety, and thus does not have a retail inspection or regulation program. The FDA promulgates the *Model Food Code* which is presented as a guide that is generally used in formulating state regulations or directly adopted by state programs. Our surrounding states have adopted various versions of that code. Retail food establishments in Illinois are licensed at the county or municipal level. Cook County does not have a separate category for mobile retail food establishment bases. Licensing fees for retail food establishments are based on whether the establishment has seats for customers and if not, the total area occupied by the business. Chicago differentiates licenses for mobile food dispensers and mobile food preparers. Minnesota has different license categories for mobile and stationary retail food businesses, with the fee based on sales volume. There is no separate Minnesota license category for mobile retail food establishment bases. Retail food establishments (not restaurants) in Minnesota are primarily regulated by the Department of Agriculture. Minnesota restaurants are primarily regulated by county or municipal agencies. Hennepin County, for example, sets license fees based on menu breadth, degree of hazard of menu items, and size of operation, with separate categories for mobile and itinerant businesses. Iowa has a separate license category for a commissary serving a mobile retail food establishment. The retail food establishment category in Iowa includes restaurants. Michigan includes restaurants as a type of retail food establishment and has separate categories for mobile and mobile commissary operations. This emergency rule is thus consistent with rules in some neighboring states.

Data and Analytical Methods

The Department and DHS have worked together to promulgate this emergency rule, and, after the transfer of FSRL to DFS, will work together through the standard rule-making process which involves stakeholder advisory committees and public hearings to promulgate a final rule that combines regulatory equity with a reasonable assessment of the licensable activities performed at bases supporting mobile restaurants and other mobile retail food establishments.

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Rule comments will be accepted up to two weeks after the last public hearing is held on this rule. Hearing dates will be scheduled after this rule is approved by the Governor and published in the Wisconsin State Journal.

FINDING OF EMERGENCY

- (1) An emergency rule is necessary to address the inequity in the licensing and inspection of bases supporting mobile restaurants and mobile retail food establishments. If approved, it will allow the Department to start the process of licensing and providing inspection services to the bases supporting mobile retail food establishments immediately, and would keep the inequity from being perpetuated in the merged rule that will go into effect on July 1, 2016.
- (2) If the Department 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 the Department 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-related deficiencies in facility or practice occurring at a base associated with a mobile retail food establishment.

EMERGENCY RULE

1 **SECTION 1.** ATCP 75.01 (5m) and (9) are created to read:

2 **(5m)** "Mobile retail food establishment base" means a facility at which a mobile retail
3 food establishment may, at minimum:

4 (a) dispose of leftover food and waste water,

5 (b) replenish potable water, cleaned and sanitized equipment and utensils, food prepared
6 on-site or at another source that complies with law, and other supplies;

7 (c) clean and sanitize as appropriate,

8 (d) be inspected, and

9 (e) be maintained

1 (9) “Special event or temporary event” means a fair, carnival, circus, public exhibition,
2 anniversary sale, occasional sales promotion, or community sponsored event that is open to the
3 public for not more than 14 consecutive days.

4 **SECTION 2.** ATCP 75.03 (1) is amended to read:

5 (1) *License Required.* Except as provided under sub. (9), no person may operate a retail
6 food establishment or a mobile retail food establishment base without a valid license issued by
7 the department or an agent municipality or county. Licenses expire on June 30 annually. Except
8 as specified in (a) - (d), each ~~Each~~ retail food establishment and each mobile retail food
9 establishment base shall have a separate license, which shall be prominently displayed in the
10 retail food establishment and at the mobile retail food establishment base. A license is not
11 transferable between persons, ~~or~~ establishments, or mobile retail food establishment bases.

12 (a) A mobile retail food establishment base license is not required if the same person
13 holds a license for a mobile retail food establishment and holds a license for food storage,
14 processing, or preparation activities at the establishment serving as the mobile retail food
15 establishment base.

16 (b) An operator of a mobile retail food establishment operated in conjunction with a
17 special or temporary event is not required to hold a license for a mobile retail food establishment
18 base.

19 (c) If a person conducts food storage, processing, or preparation activities at a mobile
20 retail food establishment base that are not covered under the activities of a mobile retail food
21 establishment base as defined in sub. ATCP 75.01 (5m), that person shall obtain the appropriate

1 license for the food storage, processing, or preparation activities, but is not required to obtain a
2 mobile retail food establishment base license.

3 (d) A self-contained mobile retail food establishment, meeting the requirements in
4 Chapter 9 in ATCP 75 appendix, may request a variance from the department from the
5 requirement to be supported by a license mobile retail food establishment base license.

6 **SECTION 3.** ATCP 75.03 (3) (d) is amended to read:

7 (d) For a retail food establishment that has annual sales of less than \$25,000, and is
8 engaged in food processing, or an establishment that must be licensed under sub. ATCP 75.03(1)
9 as a mobile retail food establishment base, an annual license fee of \$60.

10 **SECTION 4.** ATCP 75.03 (9) (i) is created to read:

11 (i) A mobile retail food establishment base that is exempted from a license specified
12 under par. ATCP 75.03 (1) (c) is not exempt from meeting the requirements for the food storage,
13 processing, or preparation activities conducted under the provisions of the exempted license.

14 **SECTION 5. Effective Date:** This emergency rule takes effect on July 1, 2016, and
15 remains in effect for 150 days. The department may seek to extend this emergency rule as
16 provided in s. 227.24, Stats.

17 Dated this 3rd day of June, 2016.

18 WISCONSIN DEPARTMENT OF AGRICULTURE,
19 TRADE, AND CONSUMER PROTECTION.

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Ben Brancel, Secretary