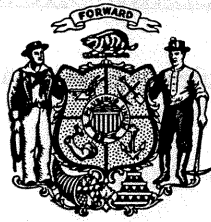


## WISCONSIN LEGISLATIVE COUNCIL STAFF

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**CLEARINGHOUSE REPORT TO AGENCY**


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[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

**CLEARINGHOUSE RULE 00-059**

AN ORDER to repeal and recreate chapter HFS 196, relating to restaurants.

Submitted by **DEPARTMENT OF HEALTH AND FAMILY SERVICES**

03-17-00 RECEIVED BY LEGISLATIVE COUNCIL.

04-13-00 REPORT SENT TO AGENCY.

RS:MCP;jal;rv

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

## 1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached      YES       NO

## 2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached      YES       NO

## 3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached      YES       NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS  
[s. 227.15 (2) (e)]

Comment Attached      YES       NO

## 5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached      YES       NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL  
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached      YES       NO

## 7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

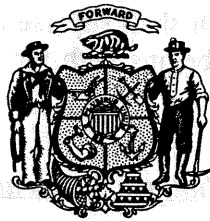
Comment Attached      YES       NO

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## CLEARINGHOUSE RULE 00-059

### Comments

**[NOTE:** All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

#### 1. Statutory Authority

Section 254.61 (5), Stats., defines the term "restaurant." The definition also states that the term "restaurant" does not include specified operations. For example, a restaurant does not include any bed and breakfast establishment that serves breakfasts only to its lodgers. In contrast, s. HFS 196.03 (5) provides in part that a restaurant does not include any bed and breakfast establishment, regardless of whether it is serving meals in addition to breakfasts to its lodgers. Also, the rule adds to the list of excluded operations any food service provided solely for needy persons. The department should explain the statutory authority for these provisions.

#### 2. Form, Style and Placement in Administrative Code

a. In s. HFS 196.03 (5) (b), semicolons or commas should be used consistently. In par. (i), the phrase "local business, governmental or other civic organization" should be replaced by the phrase "local businesses or governmental or other civic organizations."

b. In s. HFS 196.04 (2) (d), the phrase "shall be" should be replaced by the word "is." [See also, s. HFS 196.04 (2) (e).]

c. In s. HFS 196.04, it may be helpful to the reader to include a note describing the process by which an operator of a restaurant will not pay a direct fee to the department if fees are assessed by a local agent.

d. In s. HFS 196.05 (2) (c), it appears that the word "then" should be deleted.

e. In s. HFS 196.06 (4), the statutory cross-reference should read "ss. 66.124 and 254.69 (2) (g), Stats." The phrase "which shall supersede subs. (2) and (3)" is unnecessary and should be deleted, since the subsection begins with the phrase "Notwithstanding subs. (2) and (3)."

**4. Adequacy of References to Related Statutes, Rules and Forms**

The statutory cross-reference in appendix 1-201.10 (B) (33) (b) (i) should refer to "Stats." instead of "of the Wisconsin statutes."

PROPOSED ORDER OF THE  
DEPARTMENT OF HEALTH AND FAMILY SERVICES  
REPEALING AND RECREATING RULES

To repeal and recreate chapter HFS 196, relating to restaurants.

Analysis Prepared by the Department of Health and Family Services

This order proposes to revise the Department's rules for restaurants, ch. HFS 196, Wis. Adm. Code, mainly to incorporate the 1999 Federal Food Code. The Food Code is issued by the U.S. Food and Drug Administration and contains model requirements for safeguarding public health with respect to purchased food. Adherence to the Code by restaurants promotes the offering of food that is unadulterated and honestly presented to consumers. The Federal Food Code, adapted to Wisconsin, is Appendix A to ch. HFS 196 and takes the place of current ss. HFS 196.05 to 196.19, relating to food supplies; food protection; food storage; food preparation; food display service and transportation; personnel; equipment and utensils; equipment installation and location; cleaning, sanitization and storage of equipment and utensils; sanitary facilities and controls; construction and maintenance of physical facilities; mobile restaurants; temporary restaurants; special organizations serving meals; and food protection practices certification of a restaurant operator or manager.

The Wisconsin Food Code, Appendix A, is simultaneously being included by the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) as an Appendix A to the DATCP's proposed revision of ch. ATCP 75, relating to retail food establishments. The effect of having a common Wisconsin Food Code for restaurants and retail food establishments, including convenience stores, delicatessens and bakeries, is that the same rules will apply to all types of food establishments, including combinations.

The operator of every restaurant in the state must have a permit from the Department of Health and Family Services or an agent local health department before the restaurant is opened for business and in order for it to continue in business. A permit is a type of approval that signifies that the restaurant complies with the requirements intended to protect public health and safety that are set forth in ch. HFS 196. The requirements of this chapter are enforced by either the Department or a local health department that has been designated by the Department as the Department's agent.

The Department's current rules for restaurants were established in 1985 and were formatted to be similar to the U.S. Food and Drug Administration's 1976 Food Service Sanitation Manual. The rules have been amended 6 times since 1985. The major changes currently proposed to be made to ch. HFS 196 include the following:

1. Changing the temperatures required for the preparation, storage, holding and reheating of potentially hazardous foods to be consistent with national food safety standards. New temperature requirements for raw animal foods, cooked plant foods, wild game species, and exotic game species are provided.
2. Changing the cooling requirements for most potentially hazardous foods to allow longer cooling times. The new rule allows a maximum cooling time of 6 hours using a 2-step process. With certain exceptions, potentially hazardous food must be cooled from 140°F to 70°F in the first 2 hours and from 70°F to 41°F or below in the next 4 hours. Exceptions to the 2-step, 6-hour cooling process are that potentially hazardous foods made from ingredients at ambient temperature or foods received in compliance with laws that allow

temperatures above 41°F (e.g., eggs, milk, etc.) during shipment, must be cooled to 41°F or below within 4 hours.

3. Requiring the permit holder and designated person in charge to demonstrate to the regulatory authority, upon request, knowledge of foodborne disease prevention, application of Hazard Analysis Critical Control Points (HACCP) principles and code requirements.
4. Changing requirements related to handling of ready-to-eat food to specifically prohibit touching of such foods with bare hands, unless otherwise approved by the regulatory authority.
5. Adding provisions regarding the application and removal of food worker exclusions and restrictions from food preparation and service activities, based on the signs and symptoms or a physician's diagnosis of an illness that can be transmitted through food.
6. Adding a provision requiring the date marking of ready-to-eat potentially held in a food establishment 24 hours. The proposed rules require that such <sup>food?</sup> foods be clearly marked to indicate that food will be consumed or discarded within 7 calendar days or within 24 hours after thawing, if received frozen or subsequently frozen by the establishment.
7. Except for food establishments that serve a highly susceptible population, allowing a food establishment to use time (up to 4 hours) as a public health control for a working supply of potentially hazardous food before cooking, or a ready-to-eat potentially hazardous food that is displayed or held for service for immediate consumption. In order to use time as a public health control, the food establishment is ~~proposed to be~~ required to have a written procedure in place, approved by the regulatory authority, indicating how specific food items will be identified and procedures for discarding after 4 hours.
8. Requiring a permit holder to obtain a variance from the Department before doing any of the following: smoking food as a method of food preservation rather than as a method of flavor enhancement; curing food; brewing alcoholic beverages; using food additives or adding components such as vinegar as a method of food preservation rather than as a method of flavor enhancement or to render a food so it is not potentially hazardous; packaging food using a reduced oxygen packaging method; or preparing food by another method that is determined by the department to require a variance.
9. Establishing criteria for reduced oxygen packaging and require that when *Clostridium botulinum* is identified as a microbiological hazard in the final package form, a Hazard Analysis Critical Control Points (HACCP) plan with information specified and approved by the department ~~must~~ be provided.
10. Requiring the permit holder to inform consumers by brochures, deli case or menu advisories, label statement, table tents, placards, or other effective written means of the increased risk associated with eating certain animal foods that may be served raw, undercooked or otherwise not processed to eliminate pathogens.
11. Providing special requirements for food establishments serving highly susceptible populations that restrict the serving of certain foods and allow the serving of some high risk foods provided they are prepared and served in accord with an approved HACCP plan.
12. Revising and expanding food equipment certification to include certification by any American National Standard Institute (ANSI) accredited equipment program or the approval of the Department of Agriculture, Trade and Consumer Protection and the Department of Health and Family Services.

13. Reducing the required minimum number of sink compartments for manually cleaning and sanitizing utensils and equipment from 4 to 3. However, the proposed rules add a requirement that an additional sink be installed for pre-cleaning if the restaurant demonstrates that it is unable to effectively clean equipment and utensils.
14. Requiring a separate food preparation sink in all new restaurants and in an existing food establishment when there is a new operator. The appropriate regulatory authority may allow an existing establishment to continue using a sanitizer compartment of a warewash sink for food preparation if the permit holder can provide evidence that there is insufficient space for a separate food preparation sink, and permission is obtained from the Department of Commerce to air-gap the warewash sink or sanitizer compartment drain to prevent backflow.
15. Changing the food manager certification section to allow certificates to be issued for a period of less than 5 years, requiring approved food manager certification examinations to be evaluated and listed by the Conference on Food Protection and extending reciprocity to persons certified by an out-of-state manager certification program approved by the Conference on Food Protection.

These rules are promulgated under the authority of ss. 254.71 (6) and 254.74 (1), Stats. The rules interpret ss. 254.61 to 254.62, 254.64 to 254.72, 254.74 and 254.85, Stats.

SECTION 1. Chapter HFS 196 is repealed and recreated to read:

## CHAPTER HFS 196

### RESTAURANTS

- HFS 196.01 Authority and purpose
- HFS 196.02 Scope
- HFS 196.03 Definitions
- HFS 196.04 Permits and fees
- HFS 196.05 Inspections
- HFS 196.06 Enforcement
- HFS 196.07 Adoption of Wisconsin food code
- Appendix A Wisconsin Food Code

**HFS 196.01 Authority and purpose.** Sections 254.71 (6) and 254.74 (1), Stats., authorize the department to prescribe rules for restaurants and to enforce those rules for the purpose of protecting public health and safety. This chapter, including appendix A, establishes definitions; sets standards for management and personnel and for safe food operations and equipment and facilities; provides for restaurant plan review, permit issuance, inspection and enforcement actions; and requires food protection practices certification for restaurant operators and managers. For purposes of appendix A, a restaurant is a type of food service establishment.

**HFS 196.02 Applicability.** The provisions of this chapter, including appendix A, apply to any restaurant, mobile restaurant, temporary restaurant or special organization serving meals, except that ch. 9 of appendix A applies only to mobile restaurants, ch. 10 of appendix A applies only to temporary restaurants and ch. 11 of appendix A applies only to special organizations serving meals. Chapter 12 of appendix A, relating to food protection practices certification of

operators and managers, does not apply to temporary restaurants or to special organizations serving meals.

**HFS 196.03 Definitions.** In addition to the following definitions, the definitions in part 1-2 of appendix A apply to this chapter:

(1) "Agent" means the city, county or village designated by the department to issue permits to and make investigations or inspections of restaurants, including temporary restaurants and mobile restaurants.

(2) "Department" means the Wisconsin department of health and family services.

(3) "Immediate family member" means any of the following:

(a) A spouse.

(b) A grandparent, parent, sibling, child, grandchild or stepchild.

(c) The spouse of a person under par. (b).

(4) "Mobile restaurant" has the meaning of "mobile food establishment" in the appendix.

(5) "Restaurant" means any building, room or place where meals are prepared, served or sold to transients or the general public, and all places used in connection with the building, room or place and includes any public or private school lunchroom for which food service is provided by contract. "Restaurant" does not include any of the following:

(a) Taverns that serve free lunches consisting of popcorn, cheese, crackers, pretzels, cold sausage, cured fish or bread and butter.

(b) Churches, religious, fraternal, youths' or patriotic organizations, service clubs and civic organizations that occasionally prepare, serve or sell meals to transients or the general public. X

(c) Any public or private school lunchroom for which food service is directly provided by the school.

(d) Any food service provided solely for needy persons.

(e) Bed and breakfast establishments.

(f) A private individual selling food from a movable or temporary stand at a public farm sale.

(g) The serving of food or beverage through a licensed vending machine.

(h) Any college campus as defined in s. 36.05 (6m), Stats., institution as defined in s. 36.51 (1) (b), Stats., or technical college that serves meals only to the students enrolled in the college campus, institution or school or to authorized elderly persons under s. 36.51 or 38.36, Stats.

(i) A concession stand at a locally sponsored sporting event, such as a little league game. In this paragraph, "concession stand" means a food stand that serves meals and is operated exclusively for the benefit of a participating youth sports team or program or the

check  
def.



governing youth sports organization, and "locally sponsored sporting event" means a competitive game, taking place inside or outside, specifically for youth, that is organized or sponsored by one or more local business, governmental or other civic organization, or by parents of the youth, including a school-sponsored interscholastic sports competition.

plural

**Note:** For the purposes of this chapter, the term "restaurant" is synonymous with the term "food establishment" used in the appendix.

(6) "Special organization serving meals" has the meaning of "special organization serving meals" in the appendix.

(7) "Temporary restaurant" has the meaning of "temporary food establishment" in the appendix.

**HFS 196.04 Permits.** (1) APPLICATION. (a) Before opening for business, every restaurant shall obtain a permit from the department or its agent by application made by the restaurant operator upon a form furnished by the department or its agent. An application for a permit submitted to the department shall be accompanied by fees required under sub. (2).

**Note:** To obtain a copy of the application form, write: Bureau of Environmental Health, P.O. Box 2659, Madison, Wisconsin 53701-2659.

(b) An incidental food service as defined in appendix A is exempt from the permit requirement under par. (a).

why not exempt from def?

(c) A restaurant permit does not limit or interfere with the rights of any town, village or city, as provided or established chs. 60 to 62, Stats.

(2) DEPARTMENT FEES. (a) *Definition.* In this subsection, "seating capacity" means the number of seats available for use by restaurant patrons.

(b) *Annual permit fee.* The applicant or operator of a restaurant shall pay an annual permit fee to the department as follows:

1. For a restaurant that serves meals prepared from raw, canned, dried, packaged or frozen foods, \$148 and, in addition, \$77 per area for any physically separate food holding, serving or preparation area that can operate independent of other food service operations located on the premises.

2. For a restaurant that serves only individually wrapped, hermetically sealed single food servings supplied by a licensed processor, \$65.

3. For a temporary restaurant, \$77, and for a mobile restaurant base with no food preparation, \$65.

(c) *Penalty fee.* If the annual permit fee is not paid to the department within the first 15 days of the permit period, the operator of the restaurant shall pay a penalty fee of \$75 to the department, in addition to the annual permit fee, for renewal of the permit.

(d) *Fee for duplicate permit.* The charge for a duplicate permit shall be \$10.

(e) *Preinspection fee.* The operator of a restaurant shall pay to the department a preinspection fee before the department issues an initial permit or when there is a change of

↓ 5  
or agent?

operator except when the new operator is an immediate family member. The amount of the preinspection fee shall be based on the seating capacity of the restaurant, as follows:

1. For a restaurant with no seating capacity or a seating capacity of 1 to 50, the preinspection fee shall be \$125.
2. For a restaurant with a seating capacity of 51 to 150, the preinspection fee shall be \$200.
3. For a restaurant with a seating capacity of 151 or more, the preinspection fee shall be \$275.

(3) ACTION BY THE DEPARTMENT. Within 30 days after receiving a complete application for a permit, the department or its agent shall either approve the application and issue a permit or deny the application. If the application for a permit is denied, the department or its agent shall give the applicant reasons, in writing, for the denial. The department may not issue a permit to an operator of a new restaurant or at the time of a change of operator, unless the new operator is an immediate family member, without prior inspection of the restaurant by the department or its agent to ensure that the restaurant complies with the requirements of this chapter.

(3) should precede (2) note local fees

(4) DISPLAY OF PERMIT. The restaurant operator shall conspicuously display in the restaurant the permit issued by the department or its agent.

(5) CHANGE OF OPERATOR. The operator of a restaurant shall promptly notify the department in writing of his or her intention to cease operations and shall supply the department with the name and mailing address of any prospective new operator.

**Note:** To notify the Department of a change in operator, write: Bureau of Environmental Health, P.O. Box 2659, Madison, Wisconsin 53701-2659.

(6) EMERGENCY OCCURRENCES. In the event of a fire, flood, power outage, or similar event that might result in the contamination of food, or that might prevent potentially hazardous food from being held at required temperatures, the person in charge shall immediately notify the department or the public health professional who directs the local environmental health program. Upon receiving notice of the emergency, the department or the local public health professional shall take whatever action is deemed necessary to protect the public health.

(7) PLAN REVIEW. The department or its agent, when it deems necessary, may request the operator of a new or extensively remodeled restaurant to submit equipment layout plans, equipment schedules, detailed descriptions of food processing operations or menus to determine if the restaurant is complying with this chapter. A request for plans under this subsection does not replace or supersede plan review requirements of the Wisconsin department of commerce, division of buildings and safety.

**HFS 196.05 Inspections.** (1) ACCESS. An authorized employe or agent of the department, upon presenting proper identification, shall be permitted to enter, at any reasonable hours, any premises for which a permit is required under this chapter to inspect the premises, secure samples or specimens, examine and copy relevant documents and records or obtain photographs or other evidence needed to enforce the requirements of this chapter.

(2) FREQUENCY. (a) Except as specified in pars. (b) and (c), the department or its agent shall inspect a restaurant at least once every 12 months.

(b) The department or its agent may increase or decrease the interval between inspections specified in par. (a) if the restaurant is assigned an inspection frequency based on a written department approved risk-based inspection schedule that is being uniformly applied by the licensing authority.)

(c) If the inspection frequency assigned under par. (b) is less than then the inspection frequency specified in par. (a), the department or its agent shall contact the food establishment by telephone or other means at least once every 12 months to ensure that the restaurant operator and the nature of food operation have not changed.

(3) PREINSPECTION. (a) Except as provided under par. (b), the department or its agent may not grant a permit to a person intending to operate a restaurant without a preinspection of the restaurant.

(b) A preinspection is not required for a temporary restaurant, to a special organization serving meals or when a permit is transferred to an immediate family member.

**HFS 196.06 Enforcement.** (1) PERMIT DENIAL, SUSPENSION OR REVOCATION, OR THE IMPOSITION OF CONDITIONS ON A PERMIT. The department or its agent may deny, suspend or revoke a permit or, as provided under s. 254.64 (1p), Stats., may impose conditions on a permit. Except as otherwise provided by statute, rule or local ordinance, the suspension or revocation of a permit shall comply with the prior notice requirements of s. 227.51, Stats.

(2) ENFORCEMENT POLICY. (a) *Notification.* If, upon inspection of a restaurant, the authorized employe or agent of the department finds that the restaurant is not planned, operated or equipped as required by this chapter, the employe or agent shall, except as provided under par. (b), notify the operator in writing and shall specify the changes required to make the restaurant conform to the standards established in this chapter and the time period within which compliance shall take place. If the order to correct violations is not carried out by the expiration of the time period stipulated in the order, or any extension of time granted for compliance, the department may issue an order suspending or revoking the permit to operate the restaurant. The suspension or revocation order shall take effect 15 days after the date of issuance unless a request for a hearing has been received under sub. (3).

(b) *Order to deal with an immediate danger to health.* 1. Where there is reasonable cause to believe that any construction, sanitary condition, operation or method of operation of the premises of a restaurant or of equipment used on the premises creates an immediate danger to health, an authorized employe or agent of the department may, pursuant to s. 254.85, Stats., acting as the designee of the administrator of the department's division of public health, and without advance written notice, issue a temporary order to remove the immediate danger to health. The order shall take effect on delivery to the operator or other person in charge of the restaurant. The order shall be limited to prohibiting the sale or movement of food, prohibiting the continued operation or method of operation of specific equipment, requiring the premises to cease other operations or methods of operation, or a combination of the prohibitions and requirements, except that if a more limited order will not remove the immediate danger to health, the order may direct that all operation authorized by the permit shall cease. If, before scheduled expiration of the temporary order, the department determines that an immediate danger to health does in fact exist, the temporary order shall remain in effect. The department shall then schedule and hold the hearing required under s. 254.85 (3), Stats., unless the immediate

danger to health is removed or the order is not contested and the operator and the department mutually agree that a hearing is not needed.

2. Under s. 254.85, Stats., the temporary order is effective for 14 days and may be extended for another 14 days to permit the department to complete its examination. The order expires at the end of the 14-day or 28-day period unless it is terminated by the department by notice to the operator within that period, or is kept in effect beyond that period, pending a hearing, by department notification to the operator. The hearing is to be held by the department no later than 15 days after the notice is served on the operator unless the department and the operator agree on a later date, and the department must issue a final decision on the matter within 10 days after the hearing.

(3) APPEAL BY THE OPERATOR. Any operator aggrieved by an order of the department under this chapter may request a hearing to challenge the order. A temporary order shall remain in effect until a final decision is issued under s. 254.85 (3), Stats. An operator shall request a hearing within 15 days after issuance of the order. Receipt of notice is presumed within 5 days of the date the notice was mailed. An operator shall file his or her request for a fair hearing in writing with the division of hearings and appeals in the department of administration. A request is considered filed when received by the division of hearings and appeals. Procedures for the hearing shall be in accordance with ch. 227, Stats. After the hearing, the department shall affirm, set aside or modify the order. The final decision of the department may be appealed to the circuit court as provided in ch. 227, Stats.

**Note:** The mailing address of the Division of Hearings and Appeals is P.O. Box 7875, Madison, WI 53707, 608-266-3096. Hearing requests may be delivered in person to that office at 5005 University Ave., Room 201, Madison WI.

(4) LOCAL ENFORCEMENT. Notwithstanding subs. (2) and (3), if an agent issues permits directly under this chapter, the agent shall create enforcement and appeal procedures in accordance with ss. 254.69 (2) (g) and 66.124, Stats., which shall supersede subs. (2) and (3).

**HFS 196.07 Adoption of Wisconsin food code.** As permitted by s. 227.14 (1s), Stats., an amended version of the 1999 U.S. food and drug administration (FDA) recommended model food code adopted as appendix A of this chapter and retitled the Wisconsin food code is in the format of the FDA-recommended food code to ensure uniformity between the Wisconsin department of health and family services and the Wisconsin department of agriculture, trade and consumer protection in the application and enforcement of food safety requirements.

The repeal and rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2), Stats.

Wisconsin Department of Health and  
Family Services

Dated: March 15, 2000

By: \_\_\_\_\_  
Joseph Leean  
Secretary

SEAL: