



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 10-121

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

1. Statutory Authority

Section 97.29 (2) (b) 2., Stats., as created by 2009 Wisconsin Act 101, provides that a person is not required to obtain a license to operate a food processing plant to sell at retail food products that the person prepares and cans at home if specified requirements are met. The requirements relate to the pH balance of the food products, the location of the sale, the annual permissible amount of sales (\$5,000), signage, and labeling. Section ATCP 70.03 (7) (f) repeats the statutory requirements, but provides that the license exemption applies only if the additional following requirements also are met:

- (a) The individual must test, with specified equipment, the first batch of each canned food product.
- (b) If two or more individuals are involved, none of the individuals are exempt unless their combined gross receipts during the license year are less than \$5,000.
- (c) The individual must register annually with the department.
- (d) The individual must complete a department-approved acidified food processing course or must have canned the food according to a written recipe that reliably ensures the safety of the product.

- (e) The individual must maintain a complete written record of the food canning process, retain the record for at least two years, and make the record available to the department for inspection and copying upon request.

In general, ss. 97.09 (4) and 97.29 (5), Stats., give the department broad authority to promulgate rules regulating, among other things, the production, processing, handling, labeling, and sale of food products in order to “protect the public from the sale of adulterated or misbranded foods.” But, given the specificity of Act 101 and its creation of only five requirements that must be met in order to receive the license exemption, the department should explain explicitly its authority to, in effect, create additional requirements for the license exemption.

Also, while the additional rule requirement relating to the testing of each canned food product arguably falls within the department’s authority to ensure the sale of safe foods within the pH balance requirement of s. 97.29 (2) (b) 2. a., Stats., the rule requirements relating to how the canned food product is prepared, to registration, and to record-keeping appear to be quite attenuated from the language of Act 101 and the Act’s apparent intent to make easier the sale of home canned foods, subject to a notification to buyers that the canned food is home prepared.

Finally, there appears to be no statutory authority for:

- (a) Applying the law to an “individual” rather than to a “person,” as provided in s. 97.29 (2) (b) 2., Stats. The term “person” is defined in s. 990.01 (26), Stats., to include all partnerships, associations, and bodies politic or corporate. If the department is concerned that the general licensing requirement could be avoided through a serial creation of business entities, each earning less than \$5,000 each year, perhaps a statutory amendment is in order. Note, however, that the canned food product must be made in a private home.
- (b) Limiting two or more persons to sales of less than \$5,000 in one year. Is the department concerned that a family of, for example, 10 persons may attempt to aggregate the individual amount for a total of not less than \$50,000 in one year? If so, the department should explain its concerns.

[The comments in this section do not apply to the rule provisions relating to maple sap or to the rule provision relating to the sale of canned food products at a roadside stand operated on a farm where the individual resides. The department has the authority to make special exemptions under s. 97.29 (1) (g) 8., Stats.]

2. Form, Style and Placement in Administrative Code

- a. In the statement of statutes interpreted and statutory authority, the citations to s. 227.24, Stats., relating to adoption of emergency rules, should be deleted.
- b. The rule preface should include a deadline for submission of comments.

c. In s. ATCP 70.03 (7) (f) 4. and 5. c., the correct sign displays are ***“These canned goods are homemade and not subject to state inspection.”*** and ***“This product was made in a private home not subject to state licensing or inspection.”***, respectively.

d. The note following s. ATCP 70.03 (7) (f) 7. is substantive, specifying what constitutes compliance with the rule. This material should be placed in a substantive provision, rather than a note.