

Clearinghouse Rule 07-093

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

Proposed Hearing Draft
 September 26, 2007

**PROPOSED ORDER OF THE STATE OF WISCONSIN
 DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION
 ADOPTING AND AMENDING RULES**

2 The Wisconsin department of agriculture, trade and consumer protection proposes the following
 3 order *to repeal* 74.08(1)(note); *to amend* ATCP 74.03(1) and (1m), 74.08(1) and
 4 74.09(1)(intro.); *to repeal and recreate* ATCP 74.09(2); and *to create* ATCP 74.01(6m) and
 5 74.09(1)(note); *relating to* local agents that license and inspect retail food establishments for the
 6 department.

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

This rule modifies current rules related to cities and counties (“local agents”) that license and inspect retail food establishments for the department of agriculture, trade and consumer protection (“DATCP”). This rule increases fees paid by local agents, to compensate DATCP for its costs to train, evaluate and assist local agents. This rule also changes the procedures that DATCP uses to evaluate local agents.

Statutory Authority

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

DATCP has broad general authority under s. 93.07(1), Stats., to adopt rules needed to interpret and implement laws under its jurisdiction. Under s. 97.41, Stats., DATCP may contract with local agents to license retail food establishments for DATCP. DATCP may set standards for local agents, and may spell out procedures for evaluating local agents. Subject to statutory limits, DATCP may require local agents to pay fees to compensate DATCP for training, evaluation and other services provided to local agents.

Background

DATCP licenses and inspects retail food establishments such as groceries, convenience stores and retail bakeries. DATCP may contract with 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 to be licensed by DATCP.

The local agent program is growing. DATCP currently contracts with 37 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.

Local agents must pay an annual fee to compensate DATCP for its costs to train, evaluate and assist local agents. The fee is based on the number of retail food licenses issued by the local agent. The per-license fee is calculated as a percentage of the *state* retail food license fee, even if the local agent chooses to charge a higher license fee. The statutes authorize DATCP to charge up to 20% of the state license fee. DATCP originally charged a 20% fee, but in 2000 reduced the fee to 10%.

The current 10% fee is not adequate to cover DATCP costs. At the current rate, DATCP recovers only about half of its costs to train, evaluate and assist local agents. The current inadequate fee, combined with growing local participation, has produced a substantial DATCP budget deficit. In FY 2006-07, DATCP collected only \$58,800 in fees from local agents, but incurred local agent costs of \$117,800.

Rule Contents

Local Agent Fees

This rule increases fees paid by local agents, to compensate DATCP for services provided to local agents. This rule increases the fee to 20% (currently 10%) of the state license fee amount. DATCP projects that the higher fee will generate adequate revenue to cover (but not exceed) DATCP's actual and reasonable costs as allowed by statute. Local agents may adjust their license fees to pass on the increased cost, if they wish to do so. Local agents may also opt out of the program at any time.

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 alternatively be performed or supervised by environmental health specialists registered by the national environmental health association.

Evaluation of Local Agents

Under current rules, DATCP must annually evaluate local agent performance. This rule changes the standards that DATCP uses, so that the standards more nearly 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. The self-assessment must be conducted according to procedures spelled out in the agent agreement (procedures are generally based on the FDA guidelines).

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 and family services (DHFS) pursuant to a cooperative agreement with DATCP (DHFS currently evaluates local agents that license and inspect restaurants for DHFS). An agreement could also provide for reciprocal DATCP evaluation of DHFS local agents, so that the 2 agencies could minimize duplication and maximize evaluation efficiency. There is no cooperative agreement at this time.

Fiscal Impact

This rule will increase DATCP revenues to cover (but not exceed) DATCP's actual and reasonable costs to administer the local agent program. Under current rules, DATCP annually collects \$58,800 per year from all of its local agents. Under this rule, revenues will increase by \$58,800 per year so that DATCP will receive approximately \$117,600 per year. That is the approximate amount needed to cover DATCP's current annual cost of \$117,800.

Under this rule, the 37 local agents will incur combined added costs of \$58,800 per year, or an average of just under \$1,600 per local agent. The local agent program is voluntary, so local governments may opt out of the program at any time. Local agents may also recover the increased cost by increasing retail food license fees, but they are not required to do so.

Business Impact

This rule increases the fee that *local governments* must pay for services received from DATCP. Local governments may increase retail food license fees to cover the increased cost, but they are not required to do so. If a local agent passes on the full amount of its increased cost to retail license holders, the added cost allocated to each license holder may range from \$4 to \$56 per year per license holder. The actual amount will depend on the license holder's annual sales and

food processing activities. This rule does not impose any additional recordkeeping or other requirements on retail food establishments.

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. There is no fee to cover state oversight costs (oversight activities are covered by state general purpose revenue appropriations). Minnesota evaluates local agents according to FDA standards.

Illinois

Illinois delegates all retail food licensing and inspection authority to local government. There is no fee to cover state oversight costs (oversight activities are covered by state general purpose revenue appropriations). 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 performance, but does occasional audits. There is no fee to cover state oversight costs (oversight activities, such as they are, are covered by state general purpose revenue appropriations). When Iowa does review local performance, it does so according to FDA standards.

Agency Contact for Submitting Comments

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

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Trade and Consumer Protection Division
Division of Food Safety
P.O. Box 8911
Madison, WI 53708-8911
Attn: Wayne A. Kopp
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1 ATCP 74.01(6m) "Registered public health sanitarian" means a sanitarian who is
2 registered under s. 440.98, Stats., or who is recognized as a "registered environmental health
3 specialist/registered sanitarian" by the national environmental health association.

4 **SECTION 2.** ATCP 74.03(1) and (1m) are amended to read:

5 ATCP 74.03(1) A food establishment licensing program administered by a city or county
6 under an agency agreement with the department shall be adequately staffed to permit compliance
7 with this chapter, and with the terms and conditions of the agreement. Food establishment
8 inspections under the licensing program shall be made by a ~~Wisconsin~~-registered public health
9 sanitarian, or under the supervision of a ~~Wisconsin~~-registered public health sanitarian.

10 ~~Personnel~~ The city or county shall provide appropriate equipment to personnel making food
11 establishment inspections shall be provided with appropriate equipment by the city or county, as
12 provided in the agency agreement ~~with the department.~~

13 (1m) ~~By June 30, 1991, at~~ At least one registered sanitarian individual employed by in
14 each city or county food establishment licensing program shall undergo standardization
15 department training and a standardization evaluation by the department related to standardization
16 of retail food inspection procedures and criteria.

17 **SECTION 3.** ATCP 74.08(1) is amended to read:

18 ATCP 74.08(1) The fiscal year under an agency agreement shall begin on July 1 and end
19 on June 30, except as otherwise authorized by the department. Each agent city or county shall
20 pay the department ~~40%~~ 20% of the license fee charged under s. ATCP 75.015(2m), to reimburse
21 the department for its costs as required under s. 97.41(5), Stats. By September 30 of each year,
22 the agent city or county shall file with the department all reimbursement required under this
23 subsection for licenses issued during the previous fiscal year.

1 **SECTION 4.** ATCP 74.08(1)(note) is repealed.

2 **SECTION 5.** ATCP 74.09(1)(intro.) is amended to read:

3 ATCP 74.09(1)(intro.) At least once each year, the department shall review and evaluate
4 the food establishment licensing ~~and inspection~~ program of each agent city or county. The
5 evaluation may be based, in part, upon a self-assessment prepared by the agent city or county
6 according to criteria specified in the agency agreement. Review and evaluation may include:

7 **SECTION 6.** ATCP 74.09(1)(note) is created to read:

8 **NOTE:** Subject to the terms of the agency agreement, the evaluation under sub. (1) will
9 normally be patterned after evaluation procedures outlined in the “Voluntary
10 National Retail Food Regulatory Program Standards” issued by the United States
11 food and drug administration.
12

13 **SECTION 7.** ATCP 74.09(2) is repealed and recreated to read:

14 ATCP 74.09(2) At least once every 3 years, the department shall conduct on on-site
15 evaluation of the food establishment licensing program of each agent city or county. The
16 department shall evaluate the program for compliance with ch. 97, Stats., ch. ATCP 75, this
17 chapter, and other applicable rules of the department. The department may, as part of its
18 evaluation, conduct survey inspections of retail food establishments licensed by the agent city or
19 county. In lieu of conducting its own evaluation, the department may accept an equivalent
20 evaluation conducted by the Wisconsin department of health and family services pursuant to a
21 cooperative agreement with that department under s. 93.06(11), Stats.

22 **SECTION 8. EFFECTIVE DATE AND INITIAL APPLICABILITY.** (1) Except as provided in
23 sub. (2), this rule shall take effect on the first day of the month following publication in the
24 Wisconsin administrative register, as provided under s. 227.22(2)(intro.), Stats.

1 (2) The treatment of s. ATCP 74.08(1) by this rule shall first apply to reimbursements
2 due to the department on September 30, 2009, for licenses issued by agent cities or counties in
3 fiscal year 2008–09.

Dated this _____ day of _____, 2007

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Rodney J. Nilsestuen
Secretary