

HES 196.03 - FOOD SERVICE - EXEMPTION
98-087



Tommy G. Thompson
Governor

Joe Leean
Secretary



State of Wisconsin

Department of Health and Family Services

OFFICE OF LEGAL COUNSEL

1 WEST WILSON STREET
P.O. BOX 7850
MADISON WI 53707-7850

TELEPHONE: (608) 266-8428

September 4, 1998

The Honorable Brian Rude, President
Wisconsin State Senate
1 East Main, Suite 402
Madison, WI 53702

The Honorable Scott Jensen, Speaker
Wisconsin State Assembly
1 East Main, Suite 402
Madison, WI 53702

Re: Clearinghouse Rule 98-087

HFS 196.03 (11r), relating to the exemption of food service operations providing
"incidental food service" from being regulated as restaurants.

Gentlemen:

In accordance with the provisions of s. 227.19(2), Stats., you are hereby notified that the above-mentioned rule is in final draft form. This notice and the report required by s. 227.19(3), Stats., are submitted herewith in triplicate.

The rule was submitted to the Legislative Council for review under s. 227.15, Stats. A copy of the Council's report is also enclosed.

If you have any questions about the rule, please contact Edward Rabotski at 266-8294.

Sincerely,

Paul E. Menge
Administrative Rules Manager

cc. Gary Poulson, Deputy Revisor of Statutes
— Senator Robert Welch, JCRAR
Representative Glenn Grothman, JCRAR
Edward Rabotski, Division of Health
Kevin Lewis, Secretary's Office

PROPOSED ADMINISTRATIVE RULES – HFS 196.03 (11r)
ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES
PURSUANT TO S. 227.19 (3), STATS.

Need for Rules

Many retail food establishments, that is, grocery stores, convenience stores, delicatessens and bakeries, have in recent years added a food service operation to their business, in effect establishing a restaurant within the store, often with sit-down dining and full service food preparation. Also, some restaurants have added retail food sales, a bakery operation, for instance, to their business. A retail food establishment that also operates a restaurant on the same premises and a restaurant that also operates a retail food establishment on the same premises may be subject to regulation by both the Department of Agriculture, Trade and Consumer Protection (DATCP), which regulates retail food establishments under s. 97.30, Stats., and ch. ATCP 75, and the Department of Health and Family Services (DHFS), which regulates restaurants under subch. VII of ch. 254, Stats., and ch. HFS 196. This means that if under current regulations a business is found to be both a retail food establishment and a restaurant, the business must have two annual approvals (a license, permit), pay two annual approval (license, permit) fees, be subject to two inspections on the basis of two sets of rules that will not always require the same thing although both sets of rules are directed at protecting the public's health, and perhaps have to deal with two different inspection agencies.

Section HFS 196.04 (1) (b) currently exempts "incidental food services" from the requirement to have a restaurant permit. "Incidental food service" is defined in s. HFS 196.03 (11r) as meals offered to the general public that are not a primary activity of a retail food establishment, comprise no more than 25% of the gross annual food sales of the business and do not involve full service food preparation. This order changes that definition to exclude more food service operations in retail food establishments from being regulated separately as restaurants, as one measure being taken to eliminate "double licensing," that is, two different approval processes, both directed at protecting the public's health. The principal modification increases the percentage of the gross annual food sales of the business that may be derived from the sale of meals from at most 25% to less than 50%. The language relating to meals that do not involve "full service food preparation" is being deleted because the term which, like the definition of incidental food service, dates from 1990, has never been operationalized so that it is not a factor in deciding if a food service operated by a retail food establishment is an incidental food service for purposes of exempting it from the requirement that it have a permit to operate a restaurant.

The change in the definition of "incidental food service" in ch. HFS 196 will be effective, by emergency order, for permits issued by the Department starting with the permit period beginning July 1, 1998, and for permits issued by local health

departments serving as agents of the Department, pursuant to s. 254.69 (2), Stats., and ch. HSS 192, starting with the permit period beginning July 1, 1999.

Responses to Clearinghouse Recommendations

Two of the Legislative Council Rules Clearinghouse comments on the proposed rules were accepted, and the rules were modified accordingly. Responses to the other two comments are as follows:

1. Comment: Section 254.64 (1) (d), Stats., includes a provision requiring that the rules "conform to a memorandum of understanding between DHFS and the Department of Agriculture, Trade and Consumer Protection." That memorandum of understanding should be updated to reflect the provisions of the new rule.

Response: Agreed. The two agencies have an understanding. The MOU is being updated accordingly.

5.b. Comment: The Department should consider whether it intends to allow the incidental food service exemption to apply to an independent business that does not have its own separate kitchen facilities.

Response: If an independent food service within a retail food establishment does not have its own separate kitchen facilities it is considered an incidental food service and therefore exempt from regulation as a restaurant. The amended rule is clear about this.

Public Hearing

The Department held one public hearing on the proposed rule change. The hearing was in Madison on August 5, 1998. Four persons testified at the hearing and a letter from another person was delivered to Department staff at the hearing. All hearing participants supported the rule change. The following participated in the public hearing:

- | | |
|---|---|
| 1. Edward J. Lump
Wisconsin Restaurant Assn.
Madison WI | Supports rule change and commends the two agencies. Association understands that some facilities will continue to be regulated by both departments. |
| 2. Tom Leitzke
Wisconsin Department of
Agriculture, Trade and
Consumer Protection(DATCP)
Madison WI | DATCP supports the rule in the existing form. Will assist DHFS in revising the MOU to iron out details. |

- | | |
|--|---|
| 3. Tommye Schneider
City of Madison Public Health
Department
Madison WI | Supports elimination of duplicate regulation. Recommends combining food programs, and having the lead agency for public health overseeing the single program. |
| 4. Brandon Scholz
& 5. and Michelle Kussow
Wisconsin Grocers Association
Madison WI | Supports the intent of both agencies to exempt licensing of businesses as restaurants when they are only incidentally engaged in food service activities. |

The Department acknowledges these expressions of support for the rule change. No modifications were made in the proposed rule change in response to comments received from the interested public.

Final Regulatory Flexibility Analysis

This rule change gives regulatory relief to as many as 2100 grocery stores in the state, about one-third of which are small businesses as "small business" is defined in s. 227.114 (1) (a), Stats.

The affected grocery stores are licensed as retail food establishments by the Department of Agriculture, Trade and Consumer Protection (DATCP) or one of its agent local health departments and offer meals for sale to the general public within the retail food establishment, the sale of which amounts to more than 25% but less than 50% of the gross annual food sales of a store. Those stores have consequently been required to also have a restaurant permit issued by the Department of Health and Family Services or one of its agent local health departments.

The effect of the change in the definition of "incidental food service" is that these retail food establishments will no longer be required to have a separate restaurant permit, pay an annual restaurant permit fee or be inspected for compliance with the Department's rules for restaurants. The change was effective on July 1, 1998, for retail food establishments that were required to have restaurant permits issued by the Department, and will be effective on July 1, 1999, for retail food establishments that have restaurant permits issued by the Department's agent local health departments. All of these establishments will continue to be regulated by DATCP, and that regulation will include their food service operations.

PROPOSED ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
AMENDING A RULE

To amend HFS 196.03 (11r), relating to the exemption of food service operations providing "incidental food service" from being regulated as restaurants.

Analysis Prepared by the Department of Health and Family Services

Many retail food establishments, that is, grocery stores, convenience stores, delicatessens and bakeries, have in recent years added a food service operation to their business, in effect establishing a restaurant within the store, often with sit-down dining and full service food preparation. Also, some restaurants have added retail food sales, a bakery operation, for instance, to their business. A retail food establishment that also operates a restaurant on the same premises and a restaurant that also operates a retail food establishment on the same premises may be subject to regulation by both the Department of Agriculture, Trade and Consumer Protection (DATCP), which regulates retail food establishments under s. 97.30, Stats., and ch. ATCP 75, and the Department of Health and Family Services (DHFS), which regulates restaurants under subch. VII of ch. 254, Stats., and ch. HFS 196. This means that if under current regulations a business is found to be both a retail food establishment and a restaurant, the business must have two annual approvals (a license, permit), pay two annual approval (license, permit) fees, be subject to two inspections on the basis of two sets of rules that will not always require the same thing although both sets of rules are directed at protecting the public's health, and perhaps have to deal with two different inspection agencies.

Section HFS 196.04 (1) (b) currently exempts "incidental food services" from the requirement to have a restaurant permit. "Incidental food service" is defined in s. HFS 196.03 (11r) as meals offered to the general public that are not a primary activity of a retail food establishment, comprise no more than 25% of the gross annual food sales of the business and do not involve full service food preparation. This order changes that definition to exclude more food service operations in retail food establishments from being regulated separately as restaurants, as one measure being taken to eliminate "double licensing," that is, two different approval processes, both directed at protecting the public's health. The principal modification increases the percentage of the gross annual food sales of the business that may be derived from the sale of meals from at most 25% to less than 50%. The language relating to meals that do not involve "full service food preparation" is being deleted because the term which, like the definition of incidental food service, dates from 1990, has never been operationalized so that it is not a factor in deciding if a food service operated by a retail food establishment is an incidental food service for purposes of exempting it from the requirement that it have a permit to operate a restaurant.

The change in the definition of "incidental food service" in ch. HFS 196 will be effective, by emergency order, for permits issued by the Department starting with the permit period beginning July 1, 1998, and for permits issued by local health departments serving as

agents of the Department, pursuant to s. 254.69 (2), Stats., and ch. HSS 192, starting with the permit period beginning July 1, 1999.

The Department's authority to amend this rule is found in ss. 254.64 (1) (d) and 254.74, Stats. The rule interprets s. 254.64 (1) (d), Stats.

SECTION 1. HFS 196.03 (11r) is amended to read:

HFS 196.03 (11r) "Incidental food service" means meals offered to the general public that are not a primary activity of ~~the~~ an establishment licensed by the department of agriculture, trade and consumer protection as a retail food establishment under ch. 97 s. 97.30, Stats., or by a local health department serving under s. 97.41, Stats., as an agent of the department of agriculture, trade and consumer protection for this purpose, and that comprise ~~no more than 25%~~ less than 50% of gross annual food sales of the establishment, excluding sales of alcoholic beverages, and do not entail full service food preparation. "Incidental food service" does not include a restaurant that operates within an establishment licensed under s. 97.30 or 97.41, Stats., as an independent business with its own separate kitchen facilities. ~~Incidental food service includes:~~

~~(a) Sale of a beverage with a bakery item for carry-out only.~~

~~(b) Individually wrapped, hermetically-sealed single food servings obtained from an approved source located off premises, with preparation limited to heating and serving with single service utensils.~~

~~(c) Self-service prewrapped sandwiches for carry-out prepared in an on-premises delicatessen licensed by the department of agriculture, trade and consumer protection under ch. 97, Stats.~~

The rule 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) (intro.), Stats.

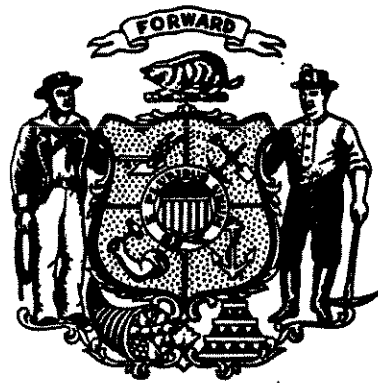
Wisconsin Department of Health and
Family Services

Dated:

By: _____
Joseph Leean
Secretary

SEAL:

END



END



TO: John Kiesow
Dept. Of Health and Family Services

FROM: Ed Lump
Executive Vice President

DATE: May 13, 1998

RE: Proposed consolidation of food licensing

The Wisconsin Restaurant Association has always worked for the highest standard for food safety and helped establish one of the best restaurant inspections in the country. We have always supported the Department of Health and Family Services and the Department of Agriculture in their efforts in this area. The result is that the Governor and his administrators can also be proud as Wisconsin leads the nation in food safety.

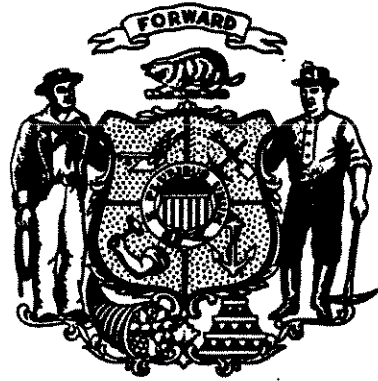
Now, WRA is offended that major changes are apparently being not only considered but dictated without anyone even bothering to consider what we might think. This is no way to treat a friend of such an important program. A program that the public relies on for its safety.

Nonetheless, we have read the proposed budget amendment and could support it if the following changes were made:

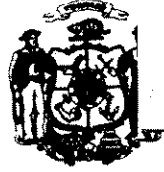
- Exempt gasoline purchases in determining the amount of food sales. The reason for this is that there is a trend for franchisees of major food service companies to attach themselves to convenience stores that sell gasoline. Also, some convenience stores run full service restaurants. These outlets are restaurants and should not be inspected by other than DH & FS inspectors. Also, the franchisees are not going to want to deal with DH & FS in some locations and the Dept of AG in others.

- Provide for DH & FS to continue to inspect locations that operate restaurants that are distinctly different from the larger business in which they are housed. In other words, if a grocery store chooses to operate a full service restaurant it would still be inspected by DH & FS.
- Postpone any action on this subject until July 1, 1999 to allow full discussion and deliberation as well as an orderly transition. WRA would be happy to participate in ongoing discussions but we will oppose the proposal as it now exists.

END



END



Sen. Bob Welch -
201 (E)

Carol Roessler
STATE SENATOR

To: Health, Family Service and Aging Committee Members
From: Sen. Carol Roessler, Chair
RE: Clearinghouse Rules
Date: Aug. 13, 1998

Attached please find CR 98-047, relating to exemption of concession stands at locally sponsored sporting events from being regulated as restaurants. The Committee has until Sept. 12 to review them. Please contact my office by Sept. 3 if you would like a public hearing on the rules (6-5300).

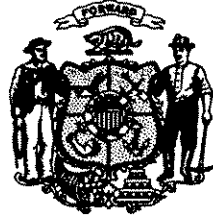
WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC
FORM 2

RULES CLEARINGHOUSE

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CLEARINGHOUSE REPORT TO AGENCY

[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 98-047

AN ORDER to amend HFS 196.03 (22) (e) and (f); and to create HFS 196.03 (22) (g) and Note, relating to exemption of concession stands at locally sponsored sporting events from being regulated as restaurants.

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

03-13-98 RECEIVED BY LEGISLATIVE COUNCIL.

04-02-98 REPORT SENT TO AGENCY.

RS:PS:jt

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

PROPOSED ADMINISTRATIVE RULES - HFS 196.03 (22) (e) to (g)
ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES
PURSUANT TO S. 227.19 (3), STATS.

Need for Rules

The current Budget Act, 1997 Wisconsin Act 27, effective October 14, 1997, created s. 254.61 (5) (g), Stats., to exempt a concession stand at a "locally sponsored sporting event" from being regulated under ch. HFS 196 as a restaurant. Following enactment of the State Budget, the Department received several inquiries from its own region-based inspectors and local health departments serving as the Department's agents for enforcement of the Department's environmental sanitation rules, including rules for restaurants, about the meaning of "locally sponsored sporting event." What did the term cover? Did it cover food stands at facilities of locally-owned sports franchises? Were these now to be exempt from regulation under the restaurant rules?

This rulemaking order adds the new exemption to the Department's rules for restaurants and, in this connection, defines both "locally sponsored sporting event" and "concession stand." The order makes clear that the exemption refers only to concession stands at sporting events for youth. That interpretation is supported by the statutory phrase, "such as a little league game," that follows the term, "locally sponsored sporting event," in s. 254.61 (5) (g), Stats. The order further narrows the applicability of the exemption by building into the definitions the Department's understanding of who organizes or sponsors an exempt sporting event and on whose behalf a concession stand at the event is operated.

The rule change were made by emergency order effective March 14, 1998. This order makes the rule change permanent.

Responses to Clearinghouse Recommendations

No comments were received from the Legislative Council's Rules Clearinghouse following review of the proposed rules.

Public Hearing

The Department held one public hearing on the proposed rule change. The hearing was in Madison on May 11, 1998. No one presented testimony at the hearing. However, three written comments were received on the proposed change during the public review period that ended a few days after the hearing. The persons who commented on the proposed rule change are the following, with a summary of their comments and the Department's responses:

<u>Commentor</u>	<u>Comment</u>	<u>Department Response</u>
1. Michael Schwartz Port Edwards WI	Change HFS 196.03 (22) (g) from “specifically for youth” to “primarily for youth.”	No change. The Department’s understanding is that the intent of the statute is to exempt only events for youth.
2. Rep. Marlin D. Schneider Wisconsin Rapids/ Madison WI	Change HFS 196.03 (22) (g) from “specifically for youth” to “primarily for youth” or “predominantly for youth.”	No change. The Department’s understanding is that the intent of the statute is to exempt only events for youth.
3. Loyce C. Robinson President, Wis Environmental Health Assn(WEPA) Madison WI	Require these organizations to meet at least the same minimum standards as special organizations serving meals.	No change. The statute change clearly exempts these organizations from the restaurant permit requirement.

Following public review the Department modified the proposed rulemaking order by removing the phrase “under the age of 18.” This change is in recognition that some youth sporting activities, including interscholastic sports competitions, involve some young people ages 18 and 19 and older. However, the Department remains concerned about the safety of food served to the public and therefore is taking care not to interpret the exemption too broadly. The Department will, to the extent possible, provide technical assistance and basic sanitation training to the newly exempt facilities. Moreover, although the new statute exempts these food service operations from being regulated as restaurants, the Department or a local health department will respond to complaints from the public of unsanitary conditions and inadequate food safety practices in any of these food service operations. If it has reason to believe that an exempt food service operation endangers the health of customers, the Department will take whatever action is necessary under s. 250.04 (1) and (2), Stats., to protect the public’s health.

Final Regulatory Flexibility Analysis

This rule change will not affect small businesses as “small business” is defined in s. 227.114 (1) (a), Stats. The rule change implements a statutory change. Section 254.61 (5) (g), Stats., as created by 1997 Wisconsin Act 27, exempts concession stands at locally sponsored sporting events from being regulated as restaurants. The rulemaking order adds the exemption to a list of exempt food service operations in the Department’s rules for restaurants, and in the process defines “concession stand” and “locally sponsored sporting event.”

PROPOSED ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
AMENDING AND CREATING RULES

To amend HFS 196.03 (22) (e) and (f) and to create HFS 196.03 (22) (g) and Note, relating to exemption of concession stands at locally sponsored sporting events from being regulated as restaurants.

Analysis Prepared by the Department of Health and Family Services

The current Budget Act, 1997 Wisconsin Act 27, effective October 14, 1997, created s. 254.61 (5) (g), Stats., to exempt a concession stand at a "locally sponsored sporting event" from being regulated under ch. HFS 196 as a restaurant. Following enactment of the State Budget, the Department received several inquiries from its own region-based inspectors and local health departments serving as the Department's agents for enforcement of the Department's environmental sanitation rules, including rules for restaurants, about the meaning of "locally sponsored sporting event." What did the term cover? Did it cover food stands at facilities of locally-owned sports franchises? Were these now to be exempt from regulation under the restaurant rules?

This rulemaking order adds the new exemption to the Department's rules for restaurants and, in this connection, defines both "locally sponsored sporting event" and "concession stand." The order makes clear that the exemption refers only to concession stands at sporting events for youth. That interpretation is supported by the statutory phrase, "such as a little league game," that follows the term, "locally sponsored sporting event," in s. 254.61 (5) (g), Stats. The order further narrows the applicability of the exemption by building into the definitions the Department's understanding of who organizes or sponsors an exempt sporting event and on whose behalf a concession stand at the event is operated.

These rule changes were made by emergency order effective March 14, 1998. This order makes those changes permanent.

The Department's authority to amend and create these rules is found in s. 254.74 (1), Stats. The rules interpret s. 254.61 (5) (g), Stats., as created by 1997 Wisconsin Act 27, as follows:

SECTION 1. HFS 196.03 (22) (e) and (f) are amended to read:

HFS 196.03 (22) (e) Bed and breakfast establishments; ~~or~~

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

SECTION 2. HFS 196.03 (22) (g) is created to read:

HFS 196.03 (22) (g) A concession stand at a locally sponsored sporting event, such as a little league game. In this paragraph, "concession stand" means a food stand which serves meals and is operated exclusively for the benefit of a participating youth sports team or program or the governing youth sports organization, and "locally sponsored sporting event" means a competitive game, taking place inside or outside, specifically for youth, which is organized or sponsored by one or more local business, governmental or other civic organizations, or by parents of the youth, including a school-sponsored interscholastic sports competition.

Note: Examples of locally sponsored sporting events are peewee, midget and little league baseball games, youth soccer games, minicycle races and time trials for youth, youth basketball games, youth football games, track and field competitions for youth, youth hockey tournaments and youth swimming meets.

The 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.

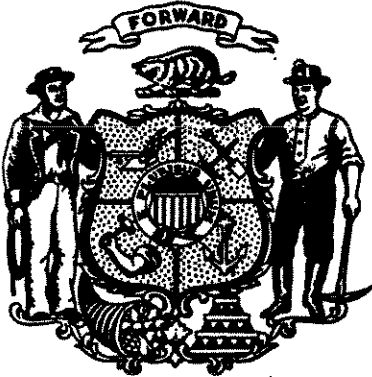
Wisconsin Department of Health and
Family Services

Date:

By: _____
Joseph Leean
Secretary

SEAL:

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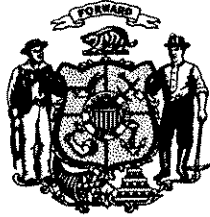


END

RULES CLEARINGHOUSE

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CLEARINGHOUSE REPORT TO AGENCY

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CLEARINGHOUSE RULE 98-087

AN ORDER to amend HFS 196.03 (11r), relating to the exemption of food service operations providing "incidental food service" from being regulated as restaurants.

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

06-11-98 RECEIVED BY LEGISLATIVE COUNCIL.

07-09-98 REPORT SENT TO AGENCY.

RS:RW:jt;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)]

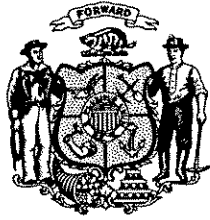
Comment Attached YES NO

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 98-087

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 October 1994.]

1. Statutory Authority

The agency cites s. 254.64 (1) (d), Stats., as authority for the rule. That statute includes a provision requiring that rules adopted under the paragraph ". . . shall conform to a memorandum of understanding between the department and the department of agriculture, trade and consumer protection." That memorandum of understanding between the two agencies should be updated to reflect the provisions of the new rule.

2. Form, Style and Placement in Administrative Code

The term "Stat." after the initial reference to "s. 97.30" in the rule should be changed to "Stats."

5. Clarity, Grammar, Punctuation and Use of Plain Language

The provision in the rule relating to independent businesses is not clear. The clarity of the provision could be improved by rephrasing the sentence to begin "Incidental food service does not include . . ." The agency may also wish to consider whether it intends to allow the "incidental food service" exemption to apply to an independent business that does not have its own separate kitchen facilities.

PROPOSED ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
AMENDING A RULE

To amend HFS 196.03 (11r), relating to the exemption of food service operations providing "incidental food service" from being regulated as restaurants.

Analysis Prepared by the Department of Health and Family Services

Many retail food establishments, that is, grocery stores, convenience stores, delicatessens and bakeries, have in recent years added a food service operation to their business, in effect establishing a restaurant within the store, often with sit-down dining and full service food preparation. Also, some restaurants have added retail food sales, a bakery operation, for instance, to their business. A retail food establishment that also operates a restaurant on the same premises and a restaurant that also operates a retail food establishment on the same premises may be subject to regulation by both the Department of Agriculture, Trade and Consumer Protection (DATCP), which regulates retail food establishments under s. 97.30, Stats., and ch. ATCP 75, and the Department of Health and Family Services (DHFS), which regulates restaurants under subch. VII of ch. 254, Stats., and ch. HFS 196. This means that if under current regulations a business is found to be both a retail food establishment and a restaurant, the business must have two annual approvals (a license, permit), pay two annual approval (license, permit) fees, be subject to two inspections on the basis of two sets of rules that will not always require the same thing although both sets of rules are directed at protecting the public's health, and perhaps have to deal with two different inspection agencies.

Section HFS 196.04 (1) (b) currently exempts "incidental food services" from the requirement to have a restaurant permit. "Incidental food service" is defined in s. HFS 196.03 (11r) as meals offered to the general public that are not a primary activity of a retail food establishment, comprise no more than 25% of the gross annual food sales of the business and do not involve full service food preparation. This order changes that definition to exclude more food service operations in retail food establishments from being regulated separately as restaurants, as one measure being taken to eliminate "double licensing," that is, two different approval processes, both directed at protecting the public's health. The principal modification increases the percentage of the gross annual food sales of the business that may be derived from the sale of meals from at most 25% to less than 50%. The language relating to meals that do not involve "full service food preparation" is being deleted because the term which, like the definition of incidental food service, dates from 1990, has never been operationalized so that it is not a factor in deciding if a food service operated by a retail food establishment is an incidental food service for purposes of exempting it from the requirement that it have a permit to operate a restaurant.

The change in the definition of "incidental food service" in ch. HFS 196 will be effective, by emergency order, for permits issued by the Department starting with the permit period beginning July 1, 1998, and for permits issued by local health departments serving as

agents of the Department, pursuant to s. 254.69 (2), Stats., and ch. HSS 192, starting with the permit period beginning July 1, 1999.

The Department's authority to amend this rule is found in ss. 254.64 (1) (d) and 254.74, Stats. The rule interprets s. 254.64 (1) (d), Stats.

SECTION 1. HFS 196.03 (11r) is amended to read:

X HFS 196.03 (11r) "Incidental food service" means meals offered to the general public that are not a primary activity of ~~the~~ an establishment licensed by the department of agriculture, trade and consumer protection as a retail food establishment under ch. 97 s. 97.30, Stats. or by a local health department serving under s. 97.41. Stats., as an agent of the department of agriculture, trade and consumer protection for this purpose, and that comprise no more than 25% less than 50% of gross annual food sales of the establishment, excluding sales of alcoholic beverages, and do not entail full service food preparation. A restaurant that operates within an establishment licensed under s. 97.30 or 97.41, Stats., as an independent business with its own separate kitchen facilities is not an "incidental food service." ~~Incidental food service includes:~~

~~(a) Sale of a beverage with a bakery item for carry out only.~~

~~(b) Individually wrapped, hermetically-sealed single food servings obtained from an approved source located off premises, with preparation limited to heating and serving with single service utensils.~~

~~(c) Self service prewrapped sandwiches for carry out prepared in an on premises delicatessen licensed by the department of agriculture, trade and consumer protection under ch. 97, Stats.~~

The rule 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) (intro.), Stats.

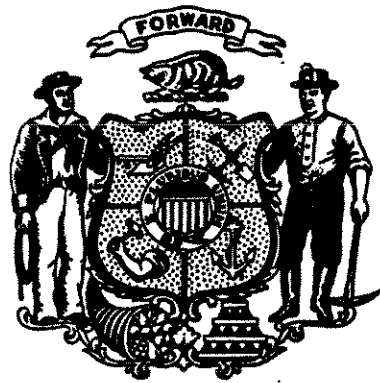
Wisconsin Department of Health and
Family Services

Dated:

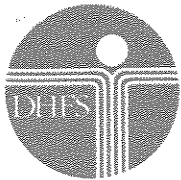
By: _____
Joseph Lcean
Secretary

SEAL:

END



END



State of Wisconsin
Department of Health and Family Services

Tommy G. Thompson, Governor
Joe Lekan, Secretary



September 4, 1998

The Honorable Robert Welch, Co-Chairperson
Joint Committee for Review of Administrative Rules
Room 201, One East Main
Madison, Wisconsin

Dear Senator Welch:

The Department of Health and Family Services has an emergency rulemaking order in effect relating to exemption of concession stands at locally sponsored sporting events from being regulated as restaurants. The emergency rules will expire before permanent rules replace them unless the effective period of the emergency rules is extended. Pursuant to s. 227.24 (2), Stats., I ask the Joint Committee to extend the effective period of the emergency rules by 52 days, from October 10, 1998, through November 30, 1998.

The current Budget Act, 1997 Wisconsin Act 27, created s. 254.61 (5) (g), Stats., which exempts "a concession stand at a locally sponsored sporting event, such as a little league game" from being regulated as a restaurant. The emergency order added this type of food service operation to a list of exempt operations in the rules. In this connection, the Department defined "concession stand" and "locally sponsored sporting event." The rule changes were published by emergency order to provide for uniform statewide enforcement and in particular to ensure that no local inspector would exempt from regulation food stands at locally sponsored sporting events for adults. The Joint Committee in executive session on July 30, 1998, extended the effective period of the rules for 60 days through October 9, 1998. Replacement permanent rules, amended to delete the phrase, "under the age of 18," in recognition that some youth sporting events involve young people who may be ages 18 and 19 and older, were submitted to the presiding officers of the Legislature on August 7, 1998, for review by standing committees but will not likely be filed until about September 15, 1998, for a December 1, 1998, effective date. If the effective period of the emergency rules is not further extended by the requested number of days, the Department in the interim cannot guarantee uniform statewide enforcement of the new statute.

A copy of the emergency rulemaking order is attached to this letter. If you have any questions about the rules, you may contact Edward Rabotski of the Department's Division of Health at 266-8294.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Joe Lekan'.

Joe Lekan
Secretary

Attachment

cc Representative Grothman

ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
AMENDING AND CREATING RULES

FINDING OF EMERGENCY

The Department of Health and Family Services finds that an emergency exists and that the adoption of the rules included in this order is necessary for the immediate preservation of the public peace, health, safety or welfare. The facts constituting the emergency are as follows:

The current Budget Act, 1997 Wisconsin Act 27, effective October 14, 1997, created s. 254.61 (5) (g), Stats., to exempt a concession stand at a "locally sponsored sporting event" from being regulated under ch. HFS 196 as a restaurant. Following enactment of the State Budget, the Department received several inquiries from its own region-based inspectors and local health departments serving as the Department's agents for enforcement of the Department's environmental sanitation rules, including rules for restaurants, about the meaning of "locally sponsored sporting event." What did the term cover? Did it cover food stands at facilities of locally-owned sports franchises? Were these now to be exempt from regulation under the restaurant rules?

This rulemaking order adds the new exemption to the Department's rules for restaurants and, in this connection, defines both "locally sponsored sporting event" and "concession stand." The order makes clear that the exemption refers only to concession stands at sporting events for youth, that is, for persons under 18 years of age. That interpretation is supported by the statutory phrase, "such as a little league game," that follows the term, "locally sponsored sporting event," in s. 254.61 (5) (g), Stats. The order further narrows the applicability of the exemption by building into the definitions the Department's understanding of who organizes or sponsors an exempt sporting event and on whose behalf a concession stand at the event is operated.

Although the Department's understanding of what "locally sponsored sporting event" should be taken to mean has been communicated to its field-based inspectors and agent local health departments, this is no more than an interpretive guideline, lacking the force of law, until the Department has set out that understanding in its rules for restaurants. Because the process for making the permanent rule change will take several months, the Department is publishing the rule change now by emergency order in the interests of protecting the public's health. The emergency rule order will ensure that, pending promulgation of the permanent rule change, there will be uniform statewide enforcement of the statute change that will prevent any local inspector from exempting from regulation food stands at locally sponsored sporting events for adults.

ORDER

Pursuant to authority vested in the Department of Health and Family Services by ss. 227.24 (1) and 254.74 (1), Stats., the Department of Health and Family Services hereby amends and creates rules interpreting s. 254.61 (5) (g), Stats., as created by 1997 Wisconsin Act 27, as follows:

SECTION 1. HFS 196.03 (22) (e) and (f) are amended to read:

HFS 196.03 (22) (e) Bed and breakfast establishments; or

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

SECTION 2. HFS 196.03 (22) (g) is created to read:

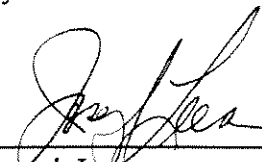
HFS 196.03 (22) (g) A concession stand at a locally sponsored sporting event, such as a little league game. In this paragraph, "concession stand" means a food stand which serves meals and is operated exclusively for the benefit of a participating youth sports team or program or the governing youth sports organization, and "locally sponsored sporting event" means a competitive game, taking place inside or outside, specifically for youth under the age of 18, which is organized or sponsored by one or more local business, governmental or other civic organizations, or by parents of the youth, including a school-sponsored interscholastic sports competition.

Note: Examples of locally sponsored sporting events are peewee, midget and little league baseball games, youth soccer games, minicycle races and time trials for youth, youth basketball games, youth football games, track and field competitions for youth, youth hockey tournaments and youth swimming meets.

The rules contained in this order shall take effect as emergency rules upon publication in the official state newspaper, as provided in s. 227.24 (1) (c), Stats.

Wisconsin Department of Health and
Family Services

Date: March 2, 1998

By: 

Joseph LEEAN
Secretary

SEAL:

LRB or Bill No./Adm. Rule No.
HFS 196.03(22)(e) to (g)
Amendment No. if Applicable

FISCAL ESTIMATE
DOA-2048 N(R10/96)

- ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

Subject EXEMPTION OF CONCESSION STANDS AT LOCALLY SPONSORED SPORTING EVENTS FROM BEING REGULATED AS RESTAURANTS

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation

- Increase Costs - May be possible to Absorb Within Agency's Budget Yes No
 Decrease Costs

Local: No local government costs

1. Increase Costs
 Permissive Mandatory
2. Decrease Costs
 Permissive Mandatory

3. Increase Revenues
 Permissive Mandatory
4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:
 Towns Villages Cities
 Counties Others _____
 School Districts WTCS Districts

Fund Sources Affected

- GPR FED PRO PRS SEG SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

This order amends the Department's rules for restaurants to add concession stands at locally sponsored sporting events to a list of food service operations that are exempt under s. 254.61 (5), Stats., from being regulated as restaurants, and for this purpose to define "concession stand" and "locally sponsored sporting event." The addition of "a concession stand at a locally sponsored sporting event, such as a little league game," was made to the list of exempt food service operations in s. 254.61 (5), Stats., by 1997 Wisconsin Act 27.

At the beginning of February 1998 the Department and agent county, city and city-county local health departments together regulated 19,635 restaurants under ch. HFS 196. The new exemption applies to very few food service operations, and will mean for both the Department and agent local health departments a very modest reduction in workload and permit fee revenues. But those reductions are the consequence of the statute change. The rulemaking order itself will not affect the expenditures or revenues of state government or local governments.

Long-Range Fiscal Implications

Agency/Prepared by: (Name & Phone No.)

H&FS/ Edward Rabotski, 266-8294

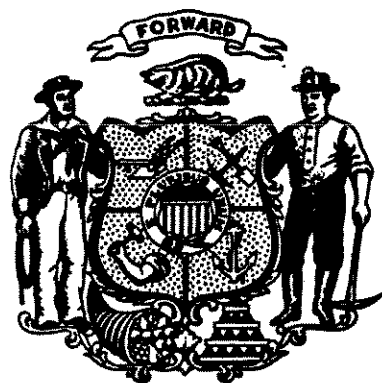
Authorized Signature/Telephone No.

Richard W. Lorang
Richard W. Lorang, 266-9622

Date

2-27-98

END



END



Tommy G. Thompson
Governor

Joe Leean
Secretary



State of Wisconsin

Department of Health and Family Services

OFFICE OF LEGAL COUNSEL

1 WEST WILSON STREET
P.O. BOX 7850
MADISON WI 53707-7850

TELEPHONE: (608) 266-8428

August 7, 1998

The Honorable Brian Rude, President
Wisconsin State Senate
1 East Main, Suite 402
Madison, WI 53702

The Honorable Scott Jensen, Speaker
Wisconsin State Assembly
1 East Main, Suite 402
Madison, WI 53702

Re: Clearinghouse Rule 98-047

HFS 196.03 (22) (e), (f) and (g) and Note, relating to exemption of concession stands at locally sponsored sporting events from being regulated as restaurants.

Gentlemen:

In accordance with the provisions of s. 227.19(2), Stats., you are hereby notified that the above-mentioned rule is in final draft form. This notice and the report required by s. 227.19(3), Stats., are submitted herewith in triplicate.

The rule was submitted to the Legislative Council for review under s. 227.15, Stats. A copy of the Council's report is also enclosed.

If you have any questions about the rule, please contact Edward Rabotski at 266-8294.

Sincerely,

Paul E. Menge
Administrative Rules Manager

cc. Gary Poulson, Deputy Revisor of Statutes
- Senator Robert Welch, JCRAR
Representative Glenn Grothman, JCRAR
Edward Rabotski, Division of Health
Thomas Sieger, Division of Health
Kevin Lewis, Secretary's Office

PROPOSED ADMINISTRATIVE RULES – HFS 196.03 (22) (e) to (g)
ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES
PURSUANT TO S. 227.19 (3), STATS.

Need for Rules

The current Budget Act, 1997 Wisconsin Act 27, effective October 14, 1997, created s. 254.61 (5) (g), Stats., to exempt a concession stand at a “locally sponsored sporting event” from being regulated under ch. HFS 196 as a restaurant. Following enactment of the State Budget, the Department received several inquiries from its own region-based inspectors and local health departments serving as the Department’s agents for enforcement of the Department’s environmental sanitation rules, including rules for restaurants, about the meaning of “locally sponsored sporting event.” What did the term cover? Did it cover food stands at facilities of locally-owned sports franchises? Were these now to be exempt from regulation under the restaurant rules?

This rulemaking order adds the new exemption to the Department’s rules for restaurants and, in this connection, defines both “locally sponsored sporting event” and “concession stand.” The order makes clear that the exemption refers only to concession stands at sporting events for youth. That interpretation is supported by the statutory phrase, “such as a little league game,” that follows the term, “locally sponsored sporting event,” in s. 254.61 (5) (g), Stats. The order further narrows the applicability of the exemption by building into the definitions the Department’s understanding of who organizes or sponsors an exempt sporting event and on whose behalf a concession stand at the event is operated.

The rule change were made by emergency order effective March 14, 1998. This order makes the rule change permanent.

Responses to Clearinghouse Recommendations

No comments were received from the Legislative Council’s Rules Clearinghouse following review of the proposed rules.

Public Hearing

The Department held one public hearing on the proposed rule change. The hearing was in Madison on May 11, 1998. No one presented testimony at the hearing. However, three written comments were received on the proposed change during the public review period that ended a few days after the hearing. The persons who commented on the proposed rule change are the following, with a summary of their comments and the Department’s responses:

<u>Commentor</u>	<u>Comment</u>	<u>Department Response</u>
1. Michael Schwartz Port Edwards WI	Change HFS 196.03 (22) (g) from “specifically for youth” to “primarily for youth.”	No change. The Department’s understanding is that the intent of the statute is to exempt only events for youth.
2. Rep. Marlin D. Schneider Wisconsin Rapids/ Madison WI	Change HFS 196.03 (22) (g) from “specifically for youth” to “primarily for youth” or “predominantly for youth.”	No change. The Department’s understanding is that the intent of the statute is to exempt only events for youth.
3. Loyce C. Robinson President, Wis Environmental Health Assn(WEPA) Madison WI	Require these organizations to meet at least the same minimum standards as special organizations serving meals.	No change. The statute change clearly exempts these organizations from the restaurant permit requirement.

Following public review the Department modified the proposed rulemaking order by removing the phrase “under the age of 18.” This change is in recognition that some youth sporting activities, including interscholastic sports competitions, involve some young people ages 18 and 19 and older. However, the Department remains concerned about the safety of food served to the public and therefore is taking care not to interpret the exemption too broadly. The Department will, to the extent possible, provide technical assistance and basic sanitation training to the newly exempt facilities. Moreover, although the new statute exempts these food service operations from being regulated as restaurants, the Department or a local health department will respond to complaints from the public of unsanitary conditions and inadequate food safety practices in any of these food service operations. If it has reason to believe that an exempt food service operation endangers the health of customers, the Department will take whatever action is necessary under s. 250.04 (1) and (2), Stats., to protect the public’s health.

Final Regulatory Flexibility Analysis

This rule change will not affect small businesses as “small business” is defined in s. 227.114 (1) (a), Stats. The rule change implements a statutory change. Section 254.61 (5) (g), Stats., as created by 1997 Wisconsin Act 27, exempts concession stands at locally sponsored sporting events from being regulated as restaurants. The rulemaking order adds the exemption to a list of exempt food service operations in the Department’s rules for restaurants, and in the process defines “concession stand” and “locally sponsored sporting event.”

PROPOSED ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
AMENDING AND CREATING RULES

To amend HFS 196.03 (22) (e) and (f) and to create HFS 196.03 (22) (g) and Note, relating to exemption of concession stands at locally sponsored sporting events from being regulated as restaurants.

Analysis Prepared by the Department of Health and Family Services

The current Budget Act, 1997 Wisconsin Act 27, effective October 14, 1997, created s. 254.61 (5) (g), Stats., to exempt a concession stand at a "locally sponsored sporting event" from being regulated under ch. HFS 196 as a restaurant. Following enactment of the State Budget, the Department received several inquiries from its own region-based inspectors and local health departments serving as the Department's agents for enforcement of the Department's environmental sanitation rules, including rules for restaurants, about the meaning of "locally sponsored sporting event." What did the term cover? Did it cover food stands at facilities of locally-owned sports franchises? Were these now to be exempt from regulation under the restaurant rules?

This rulemaking order adds the new exemption to the Department's rules for restaurants and, in this connection, defines both "locally sponsored sporting event" and "concession stand." The order makes clear that the exemption refers only to concession stands at sporting events for youth. That interpretation is supported by the statutory phrase, "such as a little league game," that follows the term, "locally sponsored sporting event," in s. 254.61 (5) (g), Stats. The order further narrows the applicability of the exemption by building into the definitions the Department's understanding of who organizes or sponsors an exempt sporting event and on whose behalf a concession stand at the event is operated.

These rule changes were made by emergency order effective March 14, 1998. This order makes those changes permanent.

The Department's authority to amend and create these rules is found in s. 254.74 (1), Stats. The rules interpret s. 254.61 (5) (g), Stats., as created by 1997 Wisconsin Act 27, as follows:

SECTION 1. HFS 196.03 (22) (e) and (f) are amended to read:

HFS 196.03 (22) (e) Bed and breakfast establishments; ~~or~~

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

SECTION 2. HFS 196.03 (22) (g) is created to read:

HFS 196.03 (22) (g) A concession stand at a locally sponsored sporting event, such as a little league game. In this paragraph, "concession stand" means a food stand which serves meals and is operated exclusively for the benefit of a participating youth sports team or program or the governing youth sports organization, and "locally sponsored sporting event" means a competitive game, taking place inside or outside, specifically for youth, which is organized or sponsored by one or more local business, governmental or other civic organizations, or by parents of the youth, including a school-sponsored interscholastic sports competition.

Note: Examples of locally sponsored sporting events are peewee, midget and little league baseball games, youth soccer games, minicycle races and time trials for youth, youth basketball games, youth football games, track and field competitions for youth, youth hockey tournaments and youth swimming meets.

The 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

Date:

By: _____
Joseph Leean
Secretary

SEAL: