

Report From Agency

DEPARTMENT OF HEALTH SERVICES REPORT TO THE LEGISLATURE

CLEARINGHOUSE RULE 12-038

Ch. DHS 196 and its Appendix, relating to restaurants and the Wisconsin Food Code

Basis and Purpose of Proposed Rule

Section 254.74 (1) Stats, gives the department broad authority to administer and enforce ch. 254, subch. VII, Stats., relating to lodging and food protection (subchapter) and the rules promulgated under the subchapter and any other rules or laws relating to the public health and safety in hotels, tourist rooming houses, bed and breakfast establishments, restaurants, vending machine commissaries, vending machines and vending machine locations.

DHS's authority to make rules relating to restaurants is found in s. 254.74 (1) (d), Stats., which provides that DHS may prescribe rules and fix standards, including rules covering the general sanitation and cleanliness of premises regulated under the subchapter, the proper handling and storing of food on such premises, the construction and sanitary condition of the premises and equipment to be used and the location and servicing of equipment.

The format of the Wisconsin Food Code is different than that of most state administrative rules. DHS is authorized under s. 227.14 (1s), Stats., to use the drafting format of the Federal Drug Administration (FDA) Model Food Code. This rule follows that authorized format.

DHS currently licenses (issues permits to) and inspects restaurants under ch. DHS 196 and its appendix, the Wisconsin Food Code. The proposed changes updates ch. DHS 196, and the existing Wisconsin Food Code to the 2009 FDA Model Food Code. DHS last revised the Wisconsin Food Code in 2006 when it adopted the 2005 FDA Model Food Code in a joint effort with the Department of Agriculture, Trade and Consumer Protection (DATCP) which administers the Wisconsin Food Code (appendix to ch. ATCP 75) with respect to licensing and inspection of retail food establishments such as grocery stores. Since that time food safety practices have advanced and the new 2009 FDA Model Food Code reflects the current science regarding food safety practices, procedures, and policies. The 2009 FDA Model Food Code is a living breathing document that is updated every 4 years to reflect current thinking and science in the areas of food safety. DHS tries to adhere to that schedule to provide their operators the most updated rules that reflect current trends and science in food safety.

By consent of the Attorney General on August 27, 2012, the proposed Wisconsin Food Code incorporates by reference, the U.S. Department of Health and Human Services, Public Health Service, FDA, publication *Grade "A" Pasteurized Milk Ordinance*, (2011 Revision) and the Interstate Shellfish Sanitation Conference and U.S. Department of Health and Human Services, FDA publication, *National Shellfish Sanitation Program, Guide for the Control of Molluscan Shellfish*, (2009 Revision).

Department Response to Legislative Council Rules Clearinghouse Recommendations

The Legislative Council Rules Clearinghouse (Clearinghouse) made a number of comments on the proposed rule relating to various inconsistencies between the proposed and existing Wisconsin Food Code, and between the DHS and DATCP versions of the proposed Wisconsin Food Code. The Clearinghouse also commented on the formatting conventions used by DHS and DATCP in their respective versions of the proposed Wisconsin Food Code.

In response to the Clearinghouse comments, DHS and DATCP staff met with Clearinghouse representatives and explained that the formatting conventions proposed in the Wisconsin Food Code are the formatting conventions used in the 2009 FDA Model Food Code. Upon explanation, Clearinghouse representatives understand that DHS and DATCP seek to stay consistent with the 2009 FDA Model Food Code. Also, in response to Clearinghouse comments, DHS and DATCP reconciled the two versions of the proposed Wisconsin Food Code as suggested by the Clearinghouse so that DHS and DATCP are now using a single proposed draft of the Wisconsin Food Code going forward.

DHS, along with DATCP, did not make the following suggested changes to the proposed Wisconsin Food Code in order to keep the formatting conventions consistent with the formatting conventions of the 2009 FDA Model Food Code as permitted under s. 227.14 (1s), Stats.

- Clearinghouse Comment 2.a.(3), suggesting that the proposed rule numbers be expressed using Arabic numerals.
- Clearinghouse Comment 2.e., questioning why the departments were proposing to remove the numbering system in the definitions section of the Wisconsin Food Code.
- Clearinghouse Comment 2.f., suggesting that the definition of “CIP” be placed before the definition of “CFR” to maintain alphabetical order of the terms themselves.
- Clearinghouse Comment 2.i., questioning whether certain portions of the proposed Wisconsin Food Code should contain unusual partial capitalization.
- Clearinghouse Comment 2.k., suggesting that heading terms in the margins be capitalized or underscored.
- Clearinghouse Comment 2.m., suggesting that references to titles of CFR sections be omitted or set off from the CFR citation as a comma-separated clause or by a parenthetical reference.
- Clearinghouse Comment 4.b., suggesting where a defined term has a corresponding state statutory definition, that the statutory definition be cited instead of the CFR definition.
- Clearinghouse Comment 5.a., suggesting that though DHS and DATCP are authorized to use the format of the FDA Model Food Code, the agencies are not required to adhere to the wording of the FDA Model Food Code and plain English should be used.
- Clearinghouse Comment 5.b., suggesting that the use of the term “person” or “individual” be used consistently throughout the rule.
- Clearinghouse Comment 5.e., suggesting that the term “salmonellae” be capitalized for consistency with the current rule.

- Clearinghouse Comment 5.g., questioning whether s. 2-402.11, should be titled “Hair Restraints” rather than “Effectiveness”.
- Clearinghouse Comment 5.h. suggesting that the heading title in s. 2-403.11, be changed from “Handling Prohibition” to “Service Animal Handling”.

Final Regulatory Flexibility Analysis

1. The issues raised by each small business during the public hearing(s).

Any issues raised by small business during public hearings are stated in the “Summary of Public Comments and Department Responses” section of this report to the Legislature.

2. Any changes in the rule as a result of an alternative suggested by a small business and the reasons for rejecting any of those alternatives.

Changes in the rule as a result of an alternative suggested by small business or other persons and the reasons for rejecting any of those alternatives are stated in the “Summary of Public Comments and Department Responses” section of this report to the Legislature.

3. The nature of any reports and estimated cost of their preparation by small businesses that must comply with the rule.

DHS does not expect any increase in costs with the implementation of this rule by business. The rule in fact gives operators wider latitude in implementing various food safety requirements. The proposed rule also incorporates other process and procedures that were previously only an option through the variance process, thereby decreasing the paperwork required to implement various procedures or processes. These processes include, but are not limited to Sous Vide, Reduced Oxygen Packaging, and Partial Cooking.

4. The nature and estimated costs of other measures and investments that will be required by small businesses in complying with the rule.

DHS believes that there would be no additional investment required in complying with the rule.

5. The reason for including or not including in the proposed rule any of the following methods for reducing the rule’s impact on small businesses. Also include additional cost, if any, to the department for administering or enforcing a rule which includes any of the following methods and the impact, if any, on public health, safety and welfare caused by including in the rule any of the following methods.

a. Less stringent compliance or reporting requirements for small business.

The proposed rule contains the minimum requirements for safe food handling. DHS is unable to lessen or exempt small business from the requirements of this proposed rule. DHS does offer the option for a variance or comparable compliance.

b. Less stringent schedules or deadlines for compliance or reporting requirements for small businesses, such as grandfathering or staged implementation.

The proposed rule contains the minimum requirements for safe food handling. DHS is unable to lessen or exempt small business from the requirements of this proposed rule. The department does offer the option for a variance or comparable compliance.

c. Consolidated or simplified compliance or reporting requirements for small businesses.

The proposed rule contains the minimum requirements for safe food handling. The proposed rule contains minimal reporting requirements mainly centered on alternative procedures that validate if a product or process is maintained safe.

d. Replace required design or operational standards with performance standards for small businesses.

The Wisconsin Food Code is based on the 2009 FDA Model Food Code which is a performance based code. This allows small business the opportunity to prepare foods many different ways as long as they can show that the processes and the product are maintained safe.

e. Make small businesses exempt from any or all requirements of the rules.

The proposed rule contains the minimum requirements for safe food handling to protect the general public. DHS is unable to lessen or exempt small business from the requirements of this proposed rule. DHS does offer the option for a variance or comparable compliance.

Changes to the Analysis or Fiscal Estimate/Economic Impact Analysis

Analysis

The following changes were made to rule analysis:

- The comparison information for the state of Michigan was updated to show that Michigan has adopted the 2009 FDA Model Food Code.
- Corrections were made to the introductory clause to comply with the *Administrative Rules Procedures Manual* published by the Legislative Reference Bureau and the Legislative Rules Clearinghouse.

- None substantive grammatical changes were made.

Fiscal Estimate/Economic Impact Analysis

The following change was made to the fiscal estimate/economic impact analysis:

- Updated the comparison for the State of Michigan to show that it has adopted the 2009 FDA Model Food Code.

Public Hearing Summary

The department began accepting public comments on the proposed rule via the Wisconsin Administrative Rules Website on September 6, 2012. A public hearing was held on October 9, 2012 in Madison; October 11, 2012 in Waupaca; and October 12, 2012 in Eau Claire. Six persons attended the hearings. Public comments on the proposed rule were accepted until 4:30 p.m. October 12, 2012.

List of Public Hearing Attendees and Commenters

The following is a complete list of the persons who attended the public hearing or submitted comments on the proposed rule during the public comment period, the position taken by the commenter and whether or not the individual provided written or oral comments.

Commenter #	Name and Address	Position Taken (Support or Opposed)	Method of Commenting (Oral or Written)
1.	David Roettger Sheboygan County Health Department (roettdar@co.sheboygan.wi.us)	Support	Written
2.	Beth Cleary Public Health Madison/Dane County	Support	Observed Only
3.	Stephanie Moccero Public Health Madison/Dane County	Support	Observed Only
4.	Susan Quam Wisconsin Restaurant Association	Support	Oral and Written
5.	Brian Hobbs Polk County Health Department 100 Polk County Plaza Suite 180 Balsam Lake, WI 54810	Support	Oral
6.	Jed Wohlt Waupaca County Health Department 811 Harding St. Waupaca, WI 54981	Support	Observed Only

Summary of Public Comments and Department Responses

The number(s) following each comment corresponds to the number assigned to the individual listed in the Public Hearing Attendees and Commenters section of this document.

Rule Provision	Public Comment	Department Response
General	Proposed language seems to make the code more technical and less user friendly.[1]	As new advances are made in food science and food safety practices, the Wisconsin Food Code does become more technical, but on the other hand it allows industry greater opportunity to utilize that changing science into their food service operations.
General	The descriptions for handling illnesses are helpful. [1]	No response is necessary.
General	New naming conventions of “Priority”, “Priority Foundation”, etc., are confusing. [1], [5]	The Wisconsin Food Code is in the format of the 2009 FDA Model Food Code to ensure uniformity between DHS and DATCP in the application and enforcement of food safety requirements. These changes provide consistency not only in Wisconsin jurisdictions, but with our neighboring states and throughout the nation.
General	The department should start the rule revision process within 6-months of the FDA releasing its new version of the Model Food Code. [4]	Beginning rulemaking within six months of the release of the FDA Model Food Code is an admirable goal of which DHS will encourage in future rulemaking.
General	The new revisions and updates have helped provide clarity. [5]	No response is necessary.
DHS 196.05(2)	Error in Restaurant category assignment table. The term “reheating” is listed twice causing possible confusion. [4]	DHS corrected Table DHS 196.05A, the Restaurant Category Permit Table, as indicated below to lessen any possible confusion: “Food is served that requires preparation activities such as chopping, dicing, slicing, boiling, cooling, and blanching, or reheating in order for that product to be served.”
Appendix s. 1-	Why is the definition of “Meal” eliminated? It is a very frequently	The definition for “Meal” was not eliminated. The definition was moved from Appendix s. 1-201.10(B)(51m), revised, and recreated as s. DHS

Rule Provision	Public Comment	Department Response
201.10(B)(51m)	asked question. [1]	196.03(3m).
Appendix s. 1-201.10(B)	“Code of Federal Regulations” should remain as such and not be replaced with “CFR”. [1]	The Wisconsin Food Code is in the format of the 2009 FDA Model Food Code, which uses the acronym “CFR”. Uniformity between the Wisconsin Food Code and the FDA Model Food Code provide consistency not only in Wisconsin jurisdictions, but with our neighboring states and throughout the nation.
Appendix s. 1-201.10(B)	“Balut” (why is this important?) [1]	Balut is an “egg” type that is becoming popular in Wisconsin as well as throughout the nation. The definition of “Balut” is included in the 2009 FDA Model Food Code and thus adopted for the Wisconsin Food Code.
Appendix s. 2-201.11	Likes the proposed language on Appendix ch. 2 regarding person in charge and requirements for the person in charge to be present during business operation. [1]	No response is necessary.
Appendix s. 2-103.11(M)	Likes the proposed language in Appendix ch. 2 regarding person in charge and requirements for the person in charge to be knowledgeable regarding employee health. [1]	No response is necessary.
Appendix s. 3-501.14	Why eliminate the description of “Cold Holding Temperatures and Times”? [1]	Appendix s. 3-501.14 relating to cooling procedures has not been eliminated.
Appendix s. 4-101.19	Why is “wood” no longer listed as a food contact surface? [1]	Appendix s. 4-101.19 was moved to Appendix s. 4-101.18.
Appendix s. 4-301.16	Why have the requirements for food prep sinks changed? [1]	Appendix s. 4-301.16 was reworded to simplify and clarify the requirement for a food preparation sink.
Appendix s. 4-904.14	Rinse after sanitation. Why do we have this provision? [1]	Food service operations that sanitize with chlorine wanted the option to remove any chlorine residual that remained after the sanitization process. The FDA added the procedures for this option to the 2009 FDA Model Food Code, which is now being adopted for the Wisconsin Food Code.
Appendix s. 9-4.	Why eliminate descriptions of “push carts” and “mobile units” when these	Appendix s. 9-4 is repealed because these provisions are covered elsewhere throughout the Wisconsin Food Code.

Rule Provision	Public Comment	Department Response
	type of units are becoming more popular and raising numerous questions? [1]	
Appendix ch. 12	Remove the recertification requirement and require food mangers to test by exam every 5-year as recommended by the Conference for Food Protection and FDA. [4]	A statutory change is required before the suggested revision can be made to the Wisconsin Food Code.

Summary of Items Submitted with this Report to the Legislature

Below is a checklist of the items that are attached to or included in this report to the legislature under s. 227.19 (3), Stats.

Documents/Information	Included in the Body of the Report	Attached to the Report	Not Received by DHS
Final proposed rule -- Rule Summary and Rule Text Note: If a form has been revised or created as part of this rulemaking, a reference to the form and a description of how a copy of the form may be obtained is included in a note in the rule.		X	
Department response to Rules Clearinghouse recommendations	X		
Final Regulatory Flexibility Analysis	X		
Changes to the Analysis or Fiscal Estimate/Economic Impact Analysis	X		
Public Hearing Summary	X		
List of Public Hearing Attendees and Commenters	X		

Documents/Information	Included in the Body of the Report	Attached to the Report	Not Received by DHS
Summary of Public Comments and Department Responses	X		
Fiscal Estimate/Economic Impact Analysis		X	
Revised Fiscal Estimate/Economic Impact Analysis	X		
Small Business Regulatory Review Board (SBRRB) statement, suggested changes, or other material, and reports made under s. 227.14 (2g), Stats. and The Department of Health Services' response to the SBRRB's statement, suggested changes, or other material and reports made under s. 227.14 (2g), Stats.			X
Department of Administration (DOA) report under s. 227.115 (2), Stats., on rules affecting housing			X
DOA report under s. 227.137 (6), Stats., on rules with economic impact of \$20 MM or more			X
Public Safety Commission (PSC) energy impact report under s. 227.117 (2), Stats. and The Department of Health Services' response to the PSC's energy impact report s. 227.117 (2), Stats., including a description of changes made to the rule			X