



State of Wisconsin
Governor Tony Evers

Department of Agriculture, Trade and Consumer Protection
Bradley M. Pfaff, Secretary

DATE: August 5, 2019

TO: The Honorable Roger Roth
President, Wisconsin State Senate
Room 220 South, State Capitol
PO Box 7882
Madison, WI 53707-7882

The Honorable Robin Vos
Speaker, Wisconsin State Assembly
Room 217 West, State Capitol
PO Box 8953
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FROM: Bradley M. Pfaff, Secretary
Department of Agriculture, Trade and Consumer Protection

SUBJECT: **Ch. ATCP 75– Retail Food Establishments and ATCP 75 Appendix, the Wisconsin Food Code; Final Rule Draft**

Background

The proposed rule repeals and recreates Wis. Admin. Code ch. ATCP 75 (Retail Food Establishments) and its Appendix (*Wisconsin Food Code*). This rule will bring Wisconsin into substantial accord with the U.S. Food and Drug Administration's (FDA) 2013 *Model Food Code*.

The Department typically updates the *Wisconsin Food Code* every four years, but this cycle, the Department is also updating Wis. Admin. Code ch. ATCP 75 due to the merger of the Department's Division of Food Safety with the Department of Health Services (DHS) Food Safety and Recreational Licensing section (FSRL) in July of 2016. The present rule merges, clarifies, and updates the rules regulating all retail food establishments (RFEs), those serving meals (restaurants) and those not serving meals.

Rule Content

The rule updates Wis. Admin. Code ch. ATCP 75 by incorporating significant rule provisions in the now-repealed Wis. Admin. Code ch. DHS 196 (Restaurants) and by repealing rules in Wis. Admin. Code ch. ATCP 75 concerning agent programs. Agent program rules are currently found in Wis. Admin. Code ch. ATCP 74 (Local Agents and Regulation), which also incorporates provisions from the repealed Wis. Admin. Code ch. DHS 192.

The transfer of DHS' FSRL to DATCP's Division of Food Safety necessitated the merger of two food safety regulatory systems in the renamed DATCP Division of Food and Recreational Safety. One regulatory issue was particularly in need of resolution: Restaurant operators could not wholesale food under the DHS rules, while RFE operators under DATCP's authority could engage in a limited amount of wholesaling without holding a food processing plant license. By statute, the Department now licenses restaurants as RFEs, and therefore, restaurants enjoy the same limited ability to wholesale food. The Department undertook the present rule-making process and by January of 2018 had developed a draft rule that for the first time included definitions of "wholesale" and "retail". The Department initially proposed to retain certain limitations and requirements derived from Wis. Admin. Code ch. ATCP 70 (Food Processing Plants) addressed to food processing activities for wholesale conducted by an RFE. The Department presented a final draft reflecting that framework to the Board of Agriculture, Trade and Consumer Protection (Board) in January 2018. Although the Board approved the draft, it became apparent in the aftermath of the Board meeting that industry participants felt that less restrictive limits and definitions would still adequately protect public health.

In light of this feedback, the Department formed a work group comprised of industry and local health department agent program representatives to further revise the rule. During deliberations, the work group determined that the safety of many food processing activities for wholesale, when done by RFEs, could be ensured by compliance with ATCP 75 and the ATCP 75 Appendix, and thus, no additional application of ATCP 70 requirements was necessary. The work group recognized that additional training would be necessary for local health department agent personnel, along with Department sanitarians, assigned to inspect RFEs performing these food processing activities for wholesale. The Department, as part of its ongoing work to train thoroughly food safety personnel at the state and local level, is committed to providing the necessary training.

The work group extensively discussed whether an RFE conducting food processing activities for wholesale, yet exempt from having to hold a food processing plant license, should be required to develop a written recall plan (as required in ATCP 70). Dairy plants and food processing plants must develop a written recall plan, but the work group reached consensus that this requirement was poorly suited and likely ineffective for businesses predominantly engaged in retail activities. As a result, the revised rule states that RFEs are responsible for notifying their wholesale customers of any adulterated or misbranded products that the RFE may have sold to them, as deemed appropriate for the protection of public health. The RFE operator will choose the notification mechanism.

The work group's efforts culminated in a newly revised final draft of ATCP 75, which did all of the following: a) re-defined "wholesale" and "retail", b) clarified the exemption for RFEs from the requirement to hold a food processing plant license when conducting limited (not more than 25% of gross annual food sales) food processing activities for wholesale, and c) re-drew boundaries on what types of food processing activities for wholesale are allowed. Perhaps the most important change in the wholesale and retail definitions is that the Department will no longer regard the transfer of food between two RFEs or food processing plants as wholesaling, so long as the same license holder operates the two businesses involved and the licensee transferring the food does not relinquish control of the food. This change reflects current guidance by the FDA

and follows the United States Department of Agriculture (USDA) interpretations related to differentiating “retail” from “wholesale” transactions involving meat and poultry products.

The revised definitions for “wholesale” and “retail” reflect industry practice and the de facto usage of these terms in the marketplace, as well as the FDA’s interpretation and sanction of current industry practice. The new definitions also appear in the pending revision to Wis. Admin. Code ch. ATCP 70 (Food Processing Plants). The revised rule does continue to prohibit RFEs from processing canned low-acid or acidified foods for wholesale without holding a food processing plant license and complying with the requirements stated in Wis. Admin. Code ch. ATCP 70. The aim of the updated definitions is to promote clarity and uniformity and ideally to facilitate enhanced business opportunities for industry participants.

RFEs operate under a wide range of business models, ranging from traditional restaurants, bakeries, and markets where all sales are made directly to consumers to larger operations performing varying degrees of processing and wholesaling. The revisions to the rule recognized a recently introduced business model in which a licensed RFE transports prepared food and conducts sales of individual meals directly to a workplace’s employees or guests of employees, for a limited number of days each week. Within boundaries delineated in the rule, an additional RFE license is not required for the workplace meal sales. The work group reviewed and approved this revision.

Some RFEs perform food processing for wholesale activities, which are regulated at the federal level by the FDA. This rule revision is calculated to ensure that these businesses are appropriately regulated. Wis. Admin. Code ch. ATCP 75 and its Appendix specifically govern retail sales and the internal transfer of food between businesses operated by the same license-holding entity. As revised, the rule, with the addition of federal requirements for juice and seafood processing, will apply to RFEs that conduct wholesaling only to a limited extent ($\leq 25\%$ of gross annual food sales). Businesses that predominantly wholesale the food they process must operate food safety systems as required by provisions in Wis. Admin. Code ch. ATCP 70.

With this rule revision, the Department sought to eliminate duplication, clarify expectations, and, to the extent possible, avoid the need to procure multiple licenses for the same business. However, the Department weighed these objectives in the balance with safety concerns arising from gaps in regulation. Accordingly, this rule proposes that any business holding either a meat establishment license issued by the Department, or a grant of meat / poultry inspection from the federal government, must also obtain an RFE license if the business manufactures for retail sale any meat or poultry products that are never produced under meat inspection and never bear an inspection legend. Prior to this rule revision, meat establishments were allowed to retail up to 25% of *total* meat sales without holding an RFE license because of the frequent state or federal inspection of meat processing overall. However, the Department’s experience over the past several years is that the available meat inspection resources are insufficient to adequately oversee meat and poultry products sold at retail without the state or federal mark of inspection and other safeguards attendant upon RFE status. In fact, federal meat inspection staff are explicitly directed not to inspect retail meat and food operations. The rule revision eliminates the above-described exemption from the requirement to hold an RFE license. Expectations

will thus be identical to those for businesses already licensed as RFEs to produce meat and poultry products only for retail sale.

The rule also defines and clarifies the rules for micro-markets, vending machines, and the vending machine commissaries defined in statute as serving both of those business types. The Department will license vending machine commissaries as food processing plants, which reflects the operations of these commissaries. In addition, the Department defines micro-markets to acknowledge that the latter typically operate without a human on the premises at all times to oversee operations, which is a requirement for other types of RFEs.

The revised Wis. Admin. Code ch. ATCP 75 Appendix, *Wisconsin Food Code*, provides greater clarification regarding variances and Hazard Analysis Critical Control Point (“HACCP”) plans, including the procedure for variance applications. New language also simplifies the protocols that establishments must follow when performing vacuum packing and sous-vide processing.

A significant change in the *Wisconsin Food Code* pertains to cheese curds. The Department based the revised language on a recent study of the likelihood of pathogenic bacterial growth on cheese curds. The study validates the current 24-hour-at-room-temperature limit for display of cheese curds processed under Cheddar cheese-making conditions. This scientific support of storage requirements for cheese curds allows the Department to meet Standard 1 of the FDA’s Voluntary National Retail Food Regulatory Standards Program by providing validation for any protocols that differ substantively from the FDA *Model Food Code*.

In response to industry comments, the Department added requirements for making recent inspection results available to the public, along with a prohibition against any grading or scoring of RFEs based on inspection reports or other criteria. The intent of these provisions was to avoid problems arising in the event that different jurisdictions utilize discrepant grading or scoring systems or some jurisdictions employed a grading system while others did not. The Department believed that actual inspection reports tend to be more informative than grades or scores and would allow consumers to draw their own conclusions about the merits of a given RFE.

However, after adding this provision, the Department was informed that the City of Milwaukee, which is an agent of the Department, had received a grant from the FDA contingent upon it implementing a grading program. In 2019, the Department opted to hold discussions with stakeholders including the City of Milwaukee Health Department and retail food establishment associations. All agreed that the Department could oversee a trial program for an agreed-upon duration in Milwaukee to evaluate the efficacy of such a grading program and identify the best practices to be utilized in such a program. The trial program will allow the Department to compare the use of the program in one of its agent jurisdictions against all the other agent jurisdictions that will not have the grading program in place during the trial period. The comparison will be made in terms of public health outcomes agreed upon by stakeholders and approved by the Department. At the conclusion of the trial program, the Department can decide whether grading may be used, and under what circumstances, by any of its agent programs. The proposed rule was amended to include language that implements this trial program. The Department Board approved the 2019-amended version of the proposed rule at its May, 2019 meeting.

This revised rule also harmonizes the different requirements for base facilities serving mobile RFEs that previously existed across DHS and DATCP rules. The enforcement of divergent sets of rules had created a licensing inequity between various individual operations, depending on the agency formerly conducting oversight. The proposed rule eliminates these inconsistencies and standardizes the requirements for those bases.

Finally, the rule renumbers and consolidates many provisions in the *Wisconsin Food Code* to enable greater ease of use and to allow for the intercalation of provisions pertaining to micro-markets and vending machines. The Department has also revised the criteria for setting licensing fees, shifting from basing fees on income and sales volume to a model based primarily on risk and complexity.

Other clarifications, changes, and additions include the following:

- Language and terminology are standardized and clarified between the two merged programs.
- The definitions section is expanded to facilitate understanding of the merged language and the new programs.
- The *Wisconsin Food Code* is rearranged to help clarify its contents and applications. It is also expanded to stay current with recent federal and state initiatives.

Fiscal Impact

This rule is not anticipated to have a fiscal effect on state resources. It does not require additional staff specifically to enforce the proposed rule. The Department will train its staff, and staff of local health departments serving as agents of the Department, on the new requirements.

Business Impact

The Small Business Regulatory Review Board did not issue a report on this rule. The rule should not have a major economic effect on retail food establishments since it mainly replaces and updates current rules.

For those retail food establishments requiring a licensed base, already-licensed mobile RFEs serving meals will see no change in requirements because their bases were licensed under the DHS rules that were transferred to the Department. Mobile RFEs that operate at special events or at temporary events will not need a licensed base, just as mobile RFEs serving meals operating at temporary events (such as farmers' markets) currently do not need a licensed base.

For those operators with a base serving mobile RFEs that only sell non-perishable packaged foods, the effect will also be minimal. The only operators who may face increased regulatory requirements, and the associated

expenses to meet them, are those operators who are also doing complex processing and preparation of potentially hazardous food.

Some activities performed in RFEs must also be done under the HACCP system, such as fish processing that would require implementation of a Seafood HACCP system (as required in 21 CFR part 123, as cited in s. ATCP 70.44), juice processing that would require implementation of a Juice HACCP system (as required in 21 CFR part 120, as cited in s. ATCP 70.60), or the processing and/or repacking of marine shellfish that would require compliance with the HACCP-based Marine Shellfish Program (found in s. ATCP 70.50).

The proposed rule modifies the criteria for assigning license fees. For purposes of pragmatism, the rule ties the cost of a given license to the complexity and risk of the food safety hazards associated with the particular activity, and not solely to the size of the RFE and the dollar volume of sales. In many cases, larger RFEs that may have been paying a higher license fee because of their sales volumes will now pay lower fees if their processing is not complex or high-risk. The Department's analyses suggest that the overall change in total license fee revenue will be negligible. The proposed licensing fee criteria more fairly reflect the time and personnel costs to the Department for inspections, as the inspection process itself is risk-based.

The elimination of the exemption from the requirement to obtain an RFE license, in order to conduct retail sales of meat or poultry products that do not bear an inspection legend, should not pose a major regulatory burden on meat establishments operating under state or federal meat inspection programs. Both meat inspection programs require all inspected products to be produced under HACCP. HACCP plans for cured or shelf-stable products, developed in compliance with state or federal meat inspection requirements, will meet requirements in the revised rule applicable to such products made only under an RFE license.

No comments were received during the economic impact comment period held August 8, 2017 - September 7, 2017. However, feedback on the rule was solicited from members of the Food Safety Advisory Council (FSAC), a group comprised of business and local health department agent representatives. Additionally, the Department convened a working group that supplied guidance concerning the appropriate scope of "wholesale" and "retail" activities and advised on the utility of written recall plans.

Environmental Impact

This rule will have essentially no environmental impact.

Federal and Surrounding State Programs

The FDA does not directly regulate retail food safety, and thus, it does not have a retail inspection or regulation program. The FDA promulgates the *Model Food Code*. Various editions of this document serve as the basis of retail food safety regulation in each state. Some states directly adopt the federal *Model Food Code* while others, such as Wisconsin, write regulations based on it.

This rule is generally consistent with rules in neighboring states. Surrounding states have all adopted various versions of the FDA *Model Food Code*. Wisconsin's criteria for RFE license fees differ somewhat from those in surrounding states, in the emphasis placed on complexity and risk of food safety hazards.

- RFEs in Illinois are licensed at the county or municipal level. Cook County does not have a separate category for mobile RFE bases. Licensing fees for RFEs are based on whether the establishment has seats for customers and if not, the total area occupied by the business. Chicago differentiates licenses for mobile food dispensers and mobile food preparers.
- Minnesota has different license categories for mobile and stationary retail food businesses, with the fee based on sales volume. There is no separate Minnesota license category for mobile RFE bases. RFEs that are not restaurants are primarily regulated by the Minnesota Department of Agriculture. Minnesota restaurants are primarily regulated by county or municipal agencies. Hennepin County, for example, sets license fees based on menu breadth, degree of hazard of menu items, and size of operation, with separate categories for mobile and itinerant businesses.
- Iowa has a separate license category for a commissary serving a mobile RFE. The RFE category in Iowa includes restaurants.
- Michigan includes restaurants as a type of RFE and has separate categories for mobile and mobile commissary operations.

Changes from the Hearing Draft

The Department incorporated all technical corrections suggested by the Legislative Council Rules Clearinghouse. Changes based on the public hearings and comments sent to the Department are listed in **Appendix A**. As discussed above, the Department on two occasions also made substantive changes based on industry and local health department feedback. In the first instance, the feedback led to creation of a work group, whose recommendations were incorporated into the revised rule.

Next Steps

The Governor has approved the final rule, and the Department is thus submitting the rule to the Legislature for legislative committee review. If the Legislature has no objection to the rule, the Department Secretary will sign the final rulemaking order and transmit it for publication. The rule will take effect on the first day of the month following publication.

Appendix A.

Public Hearings

The Department held five public hearings around the State. Following the public hearings, the hearing record remained open until December 15, 2017.

Public Hearing Summary

Date and Time	Location
Thursday, November 16, 2017 9:30 a.m. to 3:30 p.m.	Mead Public Library, Rocca Room 710 N. 8 th Street, Sheboygan, WI
Wednesday, November 22, 2017 9:30 a.m. to 3:30 p.m.	Division of Public Health Regional Office 2187 N. Stevens Street, Rhinelander, WI
Friday, November 24, 2017 9:00 a.m. to 3:30 p.m.	Prairie Oak State Office Building, Room 106 2811 Agriculture Drive, Madison, WI
Friday, December 1, 2017 9:30 a.m. to 3:30 p.m.	Wisconsin State Office Building, Room 129 718 W. Clairemont Ave., Eau Claire, WI
Friday, December 8, 2017 9:30 a.m. to 3:30 p.m.	Shawano Public Library 128 South Sawyer Street, Shawano, WI

List of Public Hearing Attendees and Commenters

The following is a complete list of people who attended the public hearings or submitted comments on the proposed rule during the public comment period, their position taken, and whether they provided written or oral comments.

Commenter #	Name and Address	Position Taken (Support or Opposed)	Method of Commenting (Oral or Written)
1.	Brain Becker Sauk County Health Department 505 Broadway Street Baraboo, WI 53913	Neither	Written
2.	Peter Haase Wisconsin Department of Agriculture, Trade and Consumer Protection 157 W. Church Street Oakfield, WI 53065	Neither	Written
3.	Susan Quam Wisconsin Restaurant Association 2801 Fish Hatchery Road Madison, WI 53713	Neither	Oral and Written

Commenter #	Name and Address	Position Taken (Support or Opposed)	Method of Commenting (Oral or Written)
4.	Anthony Fraundorf N7498 S. Alfalfa Lane Phillips, WI 54555	Neither	Written
5.	Brian Hobbs Polk County Health Department 100 Polk County Plaza, Suite 180 Balsam Lake, WI 54810	Neither	Written
6.	Chuck Dykstra Central Racine County Health Department 10005 Northwestern Ave Franksville, WI 53126	Neither	Written
7.	Margaret Gesner / Keith Hendricks Central Racine County Health Department 10005 Northwestern Ave Franksville, WI 53126	Neither	Written
8.	Ryan Bennet Wisconsin DATCP Ryan.bennet@wisconsin.gov	Neither	Written
9.	Trisha A. Pugal Wisconsin Hotel and Lodging Assn. 1025 S. Mooreland Road, Suite 22 Brookfield, WI 53005	Neither	Written
10.	Brian Jorata Wisconsin DATCP 3044 Sorenson Road Rhineland, WI 54501	Neither	Written
11.	Tim Mirkes N2728 Buckhorn Drive Appleton, WI 54913	Support in part	Written
12.	Jennifer Kloes 112 Otter Avenue Oshkosh, WI 54903	Oppose	Written
13.	Shelley Hersil Lincoln County Health Department 607 N. Sales Street, Suite 101 Merrill, WI 54452	Neither	Written
14.	Claire Evers City of Milwaukee Health Department 841 N. Broadway Milwaukee, WI 53202	Support in part	Written
15.	Gary Garske Portage County Health and Human Services 817 Whiting Ave Stevens Point, WI 54481	Neither	Written
16.	Mary Robl Tri-County Environmental Health Consortium 230 W. Park Street, P.O. 837 Wautoma, WI 54982	Support in Part	Written
17.	David Roettger W7684 Plank road Glenbeulah, WI 53023	Support	Oral

Commenter #	Name and Address	Position Taken (Support or Opposed)	Method of Commenting (Oral or Written)
18.	Laura Temke 549 N. 65 th Street Wauwatosa, WI 53213	Neither	Written
19.	Janel Heinrich / Doug Voegeli / Beth Cleary Public Health Madison/Dane County 2300 South Park Street, Room 2010 Madison, WI 53713	Support in part	Written
20.	Travis Peterson Barron County Health and Human Services 335 E. Monroe Ave. Barron, WI 54812	Support in part	Written
21.	Laurie Diaby Gassama 1752 Dorset Lane New Richmond, WI 54017	Support in part	Written
22.	Zach Kroening 610 S. Broadway Green Bay, WI 54301	Neither	Written
23.	Maria DeLaruelle 2300 South Park Street, Room 2010 Madison, WI 53713	Neither	Written
24.	Michael J. Murphy City of Milwaukee, 10 th District 200 E. Wells Street Milwaukee, WI 53202	Support	Written
25.	Carol Drury La Crosse County Health Department 300 4 th Street North La Crosse, WI 54601	Neither	Written
26.	Nancy Eggleston Wood, Juneau, and Adams health Departments 111 W. Jackson Street Wisconsin rapids, WI 54495	Neither	Written
27.	KT Gallagher Eau Claire City-County Health Department 720 Second Avenue Eau Claire, WI 54703	Support in part	Oral and Written
28.	Michelle Kussow Wisconsin Grocers Assn. 33 E. Main St. Suite 701 Madison, WI	Neither	Written
29.	Michelle Williams / Dianne H-Robinson / Ruth Wood Pierce County Health Department 412 W. Kinne Street Ellsworth, WI 54011	Support in part	Written
30.	Jennifer Comeau Trempealeau County Health Department 36245 Main Street Whitehall, WI 54773	Oppose	Written and Oral
31.	Samuel Flatland 1427 Virginia Lane Eau Claire, WI 54703	Support in part	Written and Oral

Commenter #	Name and Address	Position Taken (Support or Opposed)	Method of Commenting (Oral or Written)
32.	Martin Putz / Jay L. E. Ellingson / Jill Ball Kwik Trip Inc. 1626 Oak Street La Crosse, WI 54602	Support in part	Written
33.	Hsing-Yi Hsieh Festival Foods 1724 Lawrence Drive De Pere, WI 54115	Support in part	Written and Oral
34.	Todd Troskey Oneida County Health Department 7475 Lubertance Rhinelander, WI 54501	Support in part	Written and Oral
35.	Teri Schwab Oneida County Health Department 4410 Double Oaks Trail Rhinelander, WI 54501	Support in part	Written

Summary of Public Comments

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	Stronger oversight of Agent programs and oversight of Agent program fee structures. Greater oversight over direct and indirect costs used to justify license fees and greater oversight with respect to FDA national voluntary retail food standards. (3), (9), (28)	<p>The Department supports the concept of greater oversight to promote greater consistency and is taking steps to provide this consistency through a revised Agent contract and redesigned Agent evaluation protocols. Greater emphasis has been placed on Agents' budgets relating to the retail food and recreation program activities and acceptable direct and indirect costs.</p> <p>With respect to the setting of license fees, this authority is not under the purview of ATCP 75, but is statutory under ch. 97, Stats.</p> <p>The national retail food standards are voluntary and administered by the FDA. While the Department is also enrolled in these standards and encourages Agents to participate, the Department has no direct authority over the retail standards program and who chooses to participate.</p>
General	Provide consistency across all jurisdictions relating to inspection report communication. Industry does not support grading or scoring as a method for inspection report communication and asks the department to disallow grading and	The Department agrees with the need for consistency; the possibility of 55+ Agent programs each with its own grading and scoring system would ultimately lead to chaos and confusion in the public's understanding of inspection findings. The Department suggests that an online posting of inspection findings provides the most realistic and helpful assessment of actual conditions in an individual

Rule Provision	Public Comment	Department Response
	<p>promote a uniform online portal for viewing individual inspection reports. (3), (9), (28)</p>	<p>retail food establishment and proposes to include changes under ATCP 75.20 (7). This allows the consumer to make an informed choice anywhere in the State based on uniform standards for inspection reports and actual food safety violations.</p> <p>The Department added the following: ATCP 75.20 (7) POSTING OF INSPECTION REPORTS. (a) Inspection reports shall be available to the public through a web-based portal. (b) The department or its agents may not apply grades or scores to retail food establishments based on inspection reports or other criteria.</p>
<p>General</p>	<p>Allow agent health departments to maintain a scoring or grading system for inspection report communication. (14), (24)</p>	<p>The Department suggests no change based on the need for consistency. The possibility of 55+ Agent programs each with its own grading and scoring system would ultimately lead to chaos and confusion in the public's understanding of inspection findings. The Department suggests that an online posting of inspection findings provides the most realistic and helpful assessment of actual conditions in an individual retail food establishment and proposes to include changes under ATCP 75.20 (7). This allows the consumer to make an informed choice anywhere in the State based on uniform standards for inspection reports and actual food safety violations.</p>
<p>General</p>	<p>Please reconsider the use of 501(c) (3) to define organizations that are exempt from licensure. Suggest removing the (3) to include a broader number of non-profit organizations. (4), (5), (10)</p>	<p>The Department agrees that this suggestion has merit and has replaced 501(c) (3) with 501(c) where it occurs in rule.</p>
<p>General</p>	<p>Interns should be able to perform retail food inspection work. (12)</p>	<p>This comment is outside the scope of this revision. This comment relates to Agent requirements under contract with the department for inspectors to be eligible to obtain a Registered Sanitarian (RS) credential at the time of hire and obtain their RS certification within 5 years (ATCP 74). These requirements are not addressed under the ATCP 75 rule, which simply refers to ATCP 74.</p>
<p>General</p>	<p>Add a licensing category for large operations such as Lambeau Field. (22)</p>	<p>Under this rule revision, license fees are mainly based on risk, and less on the size of the operation. The rule adequately addresses licensing based on risk categorization as described by the commenter. The Department encourages the commenter to contact the department to discuss their current mode of licensing these facility types. The Department recommends no change.</p>
<p>General</p>	<p>How is DATCP going to address local health department staff that encounter issues dealing with wholesaling, recall, and food production plan requirements. (23)</p>	<p>This statement is outside the scope of revision to ATCP 75. The Department suggests that the submitter contact the department to discuss their concerns. The Department recommends no change.</p>

Rule Provision	Public Comment	Department Response
General	Need to evaluate facilities requiring a retail food establishment license at a meat plant. Who will evaluate, who will notify. (23)	This is beyond the scope of ATCP 75. Establishments are responsible to apply for necessary licenses. The Department will provide training and information to help assess business needs. These issues will be addressed during the rule implementation.
General	Reinspection fees should be based on the amount of time spent by the agent doing the reinspection, and license fees should be capped for agents of the department from exceeding 250% of DATCP fees. Language should be included that defines what “reasonable costs” are related to agent fee schedules. (28)	These fee structures are not a part of the scope of this rule revision. The commenter also refers to fees charged by local agents, which is also beyond the department’s scope. Chapter 97, Stats., gives authority to agent health departments to set their own reasonable fees for the licensing, inspection, training and enforcement of retail food establishments. The Department will be addressing licensing and other fees in the future with industry and a separate scope statement and rule revision will occur at that time. Because “reasonable costs” is a statutory term, the Department will need to seek a legal interpretation regarding what are acceptable “direct” and “indirect” costs associated with licensing and inspection. These interpretations will be formulated into language in the agent contracts with the department.
ATCP 75.04	Remove the definition for “Community or social event”. This term is not used throughout ATCP 75. (5), (10), (14), (15), (20), (25), (26), (27), (30), (31)	The Department agrees. This was an oversight and the definition was removed.
ATCP 75.04 (10)	Suggest adding a phrase, “purchased by the individual hiring the culinary service, served with dishware and utensils provided by the contractor” referring to the definition of a “contract cook.” (10)	The Department agrees that “food shall be provided by the contractor” adds clarity to the definition, but “served with dishware and utensils” is not reasonable, since many contract cooks may utilize specific utensil or serving ware that facilitates their specialty. The Department proposes the following language for ATCP 75.04(10): “Contract cook” is a person who is under contract to only prepare food onsite, with food provided by the contractor, for a private occasion to the contractor or the contractor’s guests.
ATCP 75.04 (14)	The term “extensively remodeled” should be modified to indicate after the word “cosmetic refurbishing.” add the phrase “replacing like equipment” (10)	The Department agrees and modified the definition at ATCP 75.04 (14): “Extensively remodeled” means the condition of an existing retail food establishment that has undergone reconstruction or repair that altered the design or operation of the food service area, beyond redecorating, cosmetic refurbishing, replacing like equipment, or altering seating design or capacity.
ATCP 75.04 (20)	Remove the definition for “Locally sponsored sportingevent”. No requirements to ensure food safety are provided. (5), (18), (26), (27), (30), (31)	This is a statutory definition that adds clarity to a group exempt from licensing under ATCP 75.06. No change can be made.

Rule Provision	Public Comment	Department Response
ATCP 75.04 (21)	Request that the agency provide additional interpretation and clarity around food sampling activities that are exempted from licensure. (5), (18), (26), (27), (30), (31)	The Department agrees and suggests the following language in ATCP 75.04 (21): “Meal” does not include single-bite sized free food samples or an equivalent portion given away to demonstrate the characteristics of the food.
ATCP 75.04 (21)	In the term “meal” remove the phrase “ordered and” from the definition. (10)	A meal can be obtained in different ways. The Department suggests the following clarification in ATCP 75.04 (21): “Meal” means food that is ordered, prepared for, or served to a customer with or without a beverage and is obtained from the establishment in a ready-to-eat form with the expectation of immediate consumption, although consumption may occur at another location.
ATCP 75.04 (24)	The term “mobile restaurant” should be changed to “mobile retail food establishment” (10)	The Department agrees, and the terms have been defined to reflect this change in ATCP 75.04.
ATCP 75.04 (25) & (26)	Under the definition of a “mobile retail food establishment not serving meals” and “serving meals,” the reference for a “transient food establishment” is incorrect. (10)	The Department agrees, and the reference has been changed in ATCP 75.04 (26).
ATCP 75.04 (28)	Remove any reference to the term “occasional” and require all entities that provide food to the general public to demonstrate general food safety principles. (5), (18), (20), (26), (27), (30), (31)	The Department does not have the ability to remove the term “occasional” as this is a term used in state statute. The term “occasional” is used in statute to empower certain specified groups to operate exempt from licensure. If a group is exempt from licensure, the Department has no regulatory authority, except that granted by ch. 97.12, Wis. Stats., to place restrictions on that group. The Department recommends no change.
ATCP 75.04 (28)	Change the definition of “occasional” to mean not more than 3-days during any licensing year from the currently proposed 12 days, or allow 12 days if they register with the regulatory authority, or remove the 12-day exemption entirely. (1), (5), (6), (7), (11), (13), (14), (15), (20), (25), (26), (27), (29), (30), (31)	The Department agrees to modify the proposed language to the existing code language with the following modifications made for clarity. This maintains the current exemptions that previously existed in two rules (DHS 196 and DATCP 75): “Occasional” means not more than 12 days for non-meal food sales and not more than 3 days for meal food sales during any licensing year.
ATCP 75.04 (28)	Change to the term “occasional” to 12 days (21)	The Department appreciates the support and proposes the following changes in response to this and the previous comment. “Occasional” means not more than 12 days for non-meal food sales and not more than 3 days for meal food sales during any licensing year.

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ATCP 75.04 (31)	Recommendation for the definition of “potluck” to retain (a) and (b) of the definition and remove (c) and replace with “the event shall not be advertised to the general public.” (5), (14), (15), (25), (26), (27), (30), (31)	The Department does not have the ability to change the definition of “potluck” as this is a term used in state statute.
ATCP 75.04 (34)	In the definition “retail food establishment” change the wording “time and temperature” to “time or temperature”	Time and temperatures are both important and consistent with food safety and serve in conjunction with each other. The Department recommends no change.
ATCP 75.04 (35) (a)	Update the list of foods that are exempt from licensing at taverns. This is an antiquated list of foods. (21)	The Department agrees but does not have the ability to change the definition as this is a term used in state statute.
ATCP 75.04 (35) (g)	Remove the exemption for a concession stand at a locally sponsored sporting event. (21), (26), (27), (30), (31)	This is a statutory definition and exemption. The Department has no authority to change or modify statutory provisions.
ATCP 75.04 (39)	Modify the definition of “transient retail food establishment” by removing the description of those things that constitute special event or celebration and adding the words “sells or serves food for” and create a new definition for “special event” (2), (5), (8), (13), (14), (15), (18), (20), (23), (25), (26), (27), (30), (31)	<p>The Department agrees with the suggestion.</p> <ul style="list-style-type: none"> • Under 75.04 (39) the department proposes the following: <ul style="list-style-type: none"> “Transient retail food establishment” means a temporary retail food establishment that operates at a fixed location in conjunction with a special event and sells or serves food for a period of no more than 14 consecutive days or in conjunction with an occasional sales promotion. • Create new ATCP 75.04 (37) <ul style="list-style-type: none"> “Special event” means (a) A department-recognized event that is sponsored, planned, organized, and publicly advertised by organizations that include the following: <ol style="list-style-type: none"> 1. Neighborhood associations. 2. Religious groups. 3. Cultural groups. 4. Political parties. 5. Churches. 6. Schools. 7. Sports teams. 8. Fraternal organizations. 9. Non-profit organizations. 10. City, county, state or federal governments. (b) Special events are limited to gatherings of people for concerts; sporting events; trade shows; flea markets or farmers markets; public exhibitions by artists, craftsman, or vehicle enthusiasts; a fair, carnival, circus, or governmentally recognized celebration based on a specific calendar date such as a holiday or anniversary; or any other event approved by the regulatory agency. A “potluck” is not a “special event”. • Addition of ATCP 75.06 (2) (c)

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		(c) Transient retail food establishment licenses shall be valid for a period not to exceed 14 days in conjunction with a specific special event.
ATCP 75.04 (43)	In the definition of the term “wholesale” the word “sale” in the first line should be replaced with the word “transfer” (10)	The Department initially agreed with this comment and adjusted the definition of “wholesale” accordingly. However, industry groups later raised important issues about whether transfer of food from a retail food establishment at which it was processed to another retail food establishment operated by the same license-holder actually constituted wholesaling. The workgroup convened by the Department and comprised of industry and local health department agent partners agreed that this activity was not wholesaling and the definition of “wholesale” was revised. This change eliminated the issue raised by the commenter.
ATCP 75.04 (43) and 75.065	Remove the requirement that licensees operating under the wholesale exemption for retail food establishments comply with juice HACCP 21 CFR 120. This would allow the wholesaling of juice under the retail exemption without following juice HACCP. (28), (33)	This comment was initially misunderstood by the department. It was then addressed by the work group convened by the Department and comprised of industry and local health department agent partners. The new definition of wholesale developed by the work group (see previous comment) allows the transfer of juice from one retail food establishment at which it was processed to another retail food establishment operated by the same license-holder without either establishment being required to hold a food processing plant license for juice processing, and therefore follow the 21 CFR Part 120 regulations mandating Juice HACCP. This change eliminated the issue raised by the commenter.
ATCP 75.063 (2) & (3)	For clarity, the exemption for food processing plants and dairy plants should apply only to retail food establishment non-meal activities. (10)	The Department agrees and suggests the following changes: ATCP 75.063 (2) (d) The operator of the food processing plant is not engaged in the activity of a retail food establishment – serving meals. ATCP 75.063 (3) (c) The operator of the dairy plant is not engaged in the activity of a retail food establishment – serving meals.
ATCP 75.063 (8)	Would like to see more specific restrictions added to the exemption for contract cook such as “how much something can be cooked”, “where it can be cooked” and for “no more 10 people or 1 family” (31)	The comment seems to confuse the terms “contract cook” and “personal chef.” The requirements for each of these are specified in the rule. The Department recommends no change.
ATCP 75.065 (1) (c)	Add the phrase “or transient” to the section for retail food establishment license exemption for food processing plants. (10)	The Department agrees and inserted the phrase in ATCP 75.065 (1) (c).
ATCP 75.07	Provide language on a mobile base and mobile licensure to allow the Agents to issue the temporary or mobile retail food establishment license to operators	Agents already have the authority for licensure on mobile and temporary licenses that operate only in their jurisdiction. For statewide operations involving temporary

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	<p>primarily located in their jurisdiction and that license be accepted by DATCP and all other Agents. (5), (14), (15), (18), (19), (20), (25), (26), (27), (30), (31)</p>	<p>and mobile cart operations, it is the statutory responsibility of the State to issue licenses. The Department recommends no change.</p>
ATCP 75.07 (7)	<p>ATCP 75.07 (7) should be changed to read “the department and its agents shall honor a current base license from another state, if the conditions are met under par. (a-f). (10)</p>	<p>The Department agrees and suggests the following language: (7) The department and its agent shall honor a current base license from another state, if the relevant conditions under this section are met.</p>
ATCP 75.075	<p>Require plan review for all retail food establishments by the department or its Agents. (1), (5), (6), (7), (11), (13), (14), (15), (18), (19), (20), (21), (25), (26), (27), (29), (30), (31)</p>	<p>The Department agrees for consistency that all new or extensively remodeled retail food establishments should have plan reviews performed before operation. Due to the low volume of new retail food establishments–non meals, this should have a low impact on the department and its Agents. The Department modified section ATCP 75.075(1).</p>
ATCP 75.08 (1) (a) 1.	<p>In ATCP 75.08 (1) (a) 1., include in the exceptions section vending machines and micro markets. (10)</p>	<p>The Department agrees, and the changes have been incorporated into that section of the rule.</p>
ATCP 75.08 (1) (b) Table A	<p>Remove time as a public health control as a determining factor for license category. “It is much simpler to monitor a clock than it is to utilize a food thermometer to ensure foods are being maintained at proper temperatures.” (6), (7)</p>	<p>This is considered a process that must have a written plan and detailed logs in order to control potential risk. In order to correctly and adequately use time as a public health control, both time and temperature must be monitored and recorded. The Department recommends no change.</p>
ATCP 75.08 (1) (b) Table A	<p>Remove the words “or service” from the risk assessment table from the following section. “Retail food establishment has one or more additional areas where food preparation or service activities occur.” (10)</p>	<p>The Department agrees and modified that section as suggested.</p>
ATCP 75.08 (1) (b) Table A	<p>Suggest making change to Table A with “Food is served <u>or sold</u> that requires food processing activities such as, but not limited to, chopping, dicing, mixing, slicing, blanching, boiling, cooking, <u>packaging</u> and assembly, in order for that product to be served <u>or sold</u>.” (16)</p>	<p>The Department agrees that these additions provide clarity and has made the changes to Table A.</p>
ATCP 75.08 (2) Table B	<p>Add a new category titled “Transient retail food establishment- non processing” (10)</p>	<p>Without further clarification, the Department concludes that this is covered by the separation of transient license categories into TCS and Non-TCS foods. The Department recommends no change.</p>
ATCP 75.20 (4) (b) 2.	<p>Remove the section that requires an inspection report to provide the operator with the specific code reference to the violation noted.</p>	<p>Industry demands and expects to be provided with detailed and accurate inspection reports that indicate the actual violation in rule. This also provides an educational component to industry, helping them understand the</p>

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	(34)	specific requirements for their retail food operation. Accurate and complete citations reinforce the knowledge base of our staff and add credibility to the inspection report. The Department recommends no change.
ATCP 75.20 (5)	Change from 2 business days to 5 business days for the time required to issue the inspection report. (21)	Licensees should receive a copy of the inspection report immediately after the inspection or shortly thereafter; two business days is adequate time to provide operators a copy of their inspection report. The Department recommends no change.
ATCP 75 Appendix 1-104.11 and 9-103.11 (D)	Allow variances to be approved by the local regulatory authority instead of the department. (1), (18)	To achieve greater consistency, variances must only be granted by one agency. Industry has expressed a strong desire that the State promote uniformity amongst all retail food establishments. Proposed language indicates that Agents must review all variances and provide comment before submission to the department for approval. The Department recommends no change.
ATCP 75 Appendix 1-105.12	Requiring businesses to submit HACCP plans and variances to the local regulatory authority is burdensome and the State should approve all plans. (3)	The Department agrees and no change to the rule is necessary. All applications for HACCP Plans and variances are sent to the local regulatory authority for review for completeness, but then the documents are forwarded to the Department for final review and approval. The Department approves all variances and HACCP Plans.
ATCP 75 Appendix 1-105.12 and 1-106.13	Request that all variances be sent directly to the department for approval or for variance requests that are for multiple locations in multiple jurisdictions using the same process. (28), (32)	<p>The Department agrees in theory regarding multiple jurisdictions, but implementation is problematic. For example, there is no provision for dealing with individual failure - the department would have no option but to void the approval for the entire chain. Currently, the Department can approve or void individual variances based on performance without it affecting the entire chain. The department is willing to work with industry on specific examples, but this must occur on a case by case basis. The Department recommends no change.</p> <p>The Department disagrees with the statement that all variances be sent directly to the Department and bypass the local regulatory authority. The Department ultimately does the final approval on all variances but relies on agent health departments (who are the licensees' main contact) to provide relevant information regarding the individual operations in their jurisdiction. This aids the Department in making the determination whether approval is granted on the specific variance request. The Department recommends no change.</p>
ATCP 75 Appendix 1-201.10 (b)	<p>Revert to the previous definition regarding "packaging in sub (2)" with the following language:</p> <p>"Packaged" does not include a wrapper, carry-out box, or other nondurable container used to containerize FOOD with</p>	The Department agrees, but this is in direct conflict with the 2013 FDA Model Food Code and interpretation provided to the State by FDA regarding "packaging." The Department recommends no change at this time but is working with industry to present this change at the National Conference for Food Protection to petition FDA to change this in the Model Food Code.

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	the purpose of facilitating FOOD protection during service and receipt of the FOOD by the CONSUMER. (28), (33)	
ATCP 75 Appendix 3-201.16	Make additions to the wild mushroom section that dictates what conditions must be satisfied to be approved for the sale of wild mushroom species. (31)	The language used in the rule is specific to the 2013 FDA Model Food Code. Over 5000 species of mushrooms grow naturally in North America. The vast majority have never been tested for toxicity. It would be a monumental task to try and cover this in the Wisconsin Food Code. FDA simplified the language to allow states the ability to approve the sale of wild mushrooms based on local availability. The Conference for Food Protection provides a model guidance for wild harvested mushrooms for states and local jurisdictions to utilize for approving these operations. The Department recommends no change.
ATCP 75 Appendix 3-203.11 (C) (1)	This reference should be changed to state that the labeling information is retained for 90-days as in section 3-203.11 (D) (3). We do not believe there should be a difference in the requirements of 3-203.11 (C) and (D), just because of how the product is dispensed. (6)	One instance in the Appendix refers to a display container while the other instance refers to repacking of product, and this is in conformance with the 2013 FDA Model Food Code. The Department recommends no change.
ATCP 75 Appendix 3-304.17 (C) (3)	Request removal of 3-304.17 (C) (3) requiring dispensing equipment to be provided with hot water as part of the dispensing system. (28), (33)	The Department agrees and removed the requested citation.
ATCP 75 Appendix 3-305.14	Include specific language that hand wash sinks may not be used for food preparation. (1)	This issue is adequately addressed under 2-301.15 in ATCP 75 Appendix. The Department recommends no change.
ATCP 75 Appendix 4-602.11 (A) (6)	Remove the section relating to allergens. This is not part of the FDA Model Food Code and it will be hard to measure the effectiveness of allergen removal. (3), (28), (32), (33)	The Department agrees that this is not the correct location and removed that language from 4-602.11 and included language in 1-201.10 definition of “easily cleanable” to state that equipment shall be designed to allow the removal of allergens.
ATCP 75 Appendix 12-101.11	Remove the exemption to have a certified food manager for transient food establishment operators. These operations should be required to have a certified food manager. (18), (25)	Because of the transitory nature of these food events, the burden of obtaining a certified food manager would hamper the ability of many temporary event operators to participate in transient food events. The Department proposes for future consideration the possibility of a requirement for basic food safety training to all food employees. The Department recommends no change at this time.
ATCP 75 Appendix 12-101.11 (B)	Recommend adding simple retail food establishment – not serving meals with the final product not TCS be added to exemptions for food manager certification.	This category involves potential processing of TCS foods during manufacture. Even though the final product may be non-TCS, basic food safety knowledge must be demonstrated. The Department recommends no change.

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	(11)	
ATCP 75 Appendix 12-201.11	Recommend that retail food establishments with complex food operations be required to have a certified food manager on site at all hours during which food is being served to the public. (31)	This is not consistent with ch. 97, Stats., requirements for certified food managers or with 2013 FDA Model Food Code. The Department recommends no change.