

DEPARTMENT OF HEALTH

SUBJECT: Rules Pertaining to Retail Food Establishments

DESCRIPTION: In addition to necessary changes to the effective date and Secretary of Health name, the following changes are recommended for the Rules Pertaining to Retail Food Establishments:

1. Page 19 – Definition of “Retail Food Establishment” does not include food prepared under the Food Freedom Act.

(3) “Retail Food Establishment” does not include:

a. An establishment that offers only pre-PACKAGED FOODS that are not TIME/TEMPERATURE CONTROL FOR SAFETY FOODS;

b. A produce stand that only offers whole, uncut fresh fruits and vegetables;

c. A FOOD PROCESSING PLANT; including those that are located on the premises of a RETAIL FOOD ESTABLISHMENT;

d. A kitchen in a private home if only FOOD that is not TIME/TEMPERATURE CONTROL FOR SAFETY FOOD is prepared for sale or service at a function such as a religious or charitable organization’s bake sale if allowed by Arkansas Code Annotated 1403;

e. A kitchen in a private home if only FOOD that is not TIME/TEMPERATURE CONTROL FOR SAFETY FOOD is prepared for sale or service in accordance with the Food Freedom Act (Arkansas Code Annotated § 20-57-504).

f. An area where FOOD that is prepared as specified in Subparagraph (3)(d) of this definition is sold or offered for human consumption.

2. Page 25 – § 2-102.12 updated to reflect that newly permitted establishments have one year to comply.

2-102.12 Certified Food Protection Manager

(A) At least one EMPLOYEE that has supervisory and management responsibility and the authority to direct and control FOOD preparation and service shall be certified FOOD protection manager who has shown proficiency of required information through passing a test that is part of an ACCREDITED PROGRAM. ~~(Note: Existing RETAIL FOOD ESTABLISHMENTS have 1 year from the effective date of THIS REGULATION to comply with this section).~~ (Note: Establishments permitted after the effective date of this Rule have 12 months from date the permit is issued to comply with this section.)

3. Page 41 – § 3-201.11 clarified that Food Freedom Foods can be sold at retail food establishments.

3-201.11 Compliance with Food Law.

(A) FOOD shall be obtained from sources that comply with LAW.

(B) Except for non-TIME/TEMPERATURE CONTROL FOR SAFETY FOOD sold in accordance with the Food Freedom Act (Ark. Code Ann. §20-57-504), FOOD prepared in a private home may not be used or offered for human consumption in a RETAIL FOOD ESTABLISHMENT.

4. Page 141 – § 8-401.10 removed requirement for ADH to contact retail food establishment every 6 months to confirm that the nature of the operation has not changed.

(B) The REGULATORY AUTHORITY may increase the interval between inspections beyond 6 months if:

(1) The RETAIL FOOD ESTABLISHMENT is fully operating under an APPROVED and validated Hazard Analysis Critical Control Point (HACCP) PLAN as specified under §8-201.14 and §§8-103.12(A) and (B);

(2) The RETAIL FOOD ESTABLISHMENT is assigned a less frequent inspection frequency based on a written RISK-based inspection schedule that is being uniformly applied throughout the jurisdiction ~~and at least once every 6 months the establishment is contacted by telephone or other means by the REGULATORY AUTHORITY to ensure that the establishment manager and the nature of FOOD operation are not changed;~~ or

PUBLIC COMMENT: No public hearing was held on these proposed rules. The public comment period expired on January 27, 2022. The agency provided the following public comment summary:

During the public comment period, comments were received from the following:

- Mr. Jeffery Hugo – National Fire Sprinkler Association
- Mr. William Hyde – Rogers Arkansas Fire Marshall
- Mr. Brent Gleghorn - Fire Chief – Batesville, AR
- Mr. Gary Yarno – Director of Fire Services – Benton County, AR

All individuals listed above referenced the following comment from Mr. Hugo with the National Fire Sprinkler Association:

This public comment references the changes to the retail food rules, specifically the mention of leaking sprinklers in several sections, such as, but not limited to 3-305.11, 4-401.11, and 4-903.12. While the National Fire Sprinkler Association (NFSA) agrees retail food should not be stored under leaking sprinklers, where leaking sprinklers are found, they are required to be replaced immediately per the fire code. The 2012 Arkansas Fire Prevention Code per Section 901.6 require fire sprinkler systems to be inspected,

tested, and maintained to the (referenced) 2011 edition of NFPA 25 (Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems). NFPA 25, Section 5.2.1.1.1 and 5.2.1.1.2 states, “Sprinklers shall not show signs of leakage...any sprinkler with leakage shall be replaced...” Sprinklers are not manufactured to leak, at all, and when leaks are found, it often is a clue to a much larger problem with the establishment’s fire protection system. The fire code requires frequent inspections on fire sprinkler systems. The retail food rules protect retail food, however, it should not ignore other state and local codes that protect consumers by other codes and standards. Where retail food inspections find leaking sprinklers, it should trigger the local code official, or state fire marshal to investigate and enforce the AR fire code to remedy the status of the fire protection system.

AGENCY RESPONSE:

The Arkansas Department of Health received a comment from the National Fire Sprinkler Association (NFSA), and several similar comments referencing the NSFA comment, from local fire officials in Arkansas. The Department contacted Mr. Gary West with the NFSA with assistance from Arkansas State Fire Marshall Major Lindsey Williams. In discussion with Mr. West, the concern from the association was the redundant references to leaking fire sprinklers, which could be interpreted as a common problem. The Department agrees, due to the very rare occasion of this type of malfunction, the wording should be updated.

CONCERN:

The Arkansas Retail Food Establishment rules are verbatim language from a recent version of the FDA Food Code with edits that are state specific. The Department uses this wording to maintain consistency with the FDA Food Code, as do other states. Most states and local jurisdictions at the city level use a version of the FDA Code.

SOLUTION:

The Department is facilitating the introduction of this concern to the Conference of Food Protection Officials by the NFSA, through Mr. West, to consider rewording these rule sections. If consensus is reached, the effort would result in a recommendation to FDA from the conference to update the wording. This would be the best solution for NFSA and Mr. West agrees.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency indicated that these rules have no financial impact.

LEGAL AUTHORIZATION: The Secretary of the Arkansas Department of Health has “authority to prevent the proliferation of infections, contagious and communicable diseases resulting from unsanitary food service operations” as well as control over foodborne-illness-prevention sanitary measures. Ark. Code Ann. § 20-57-203. The Department also has permitting authority over food service establishments within the state. Ark. Code Ann. § 20-57-204(a).

Per the agency, these rules implement Act 306 of 2021, sponsored by Representative Jim Dotson. The Act provided that sales by a cottage food production operation through the Internet are exempt from the definition of “food service establishment.”

These rules also implement Act 1040 of 2021. The Act, sponsored by Senator Breanne Davis, created the Food Freedom Act and exempted certain producers of homemade food or drink products from licensure, certification, and inspection.