Alan Van Dyne *Legislative Service Commission*

S.B. 136

124th General Assembly
(As Introduced)

Sens. Wachtmann, Ryan

BILL SUMMARY

- Exempts certain cottage food production operations and processors of maple syrup, sorghum, and honey from regulation by the Department of Agriculture for selling food at wholesale as food processing establishments.
- Requires the exempt food production operations and processors of maple syrup, sorghum, and honey to label their products, except for apple butter.
- Provides that all food products are subject to food sampling by the Director of Agriculture to determine whether a product is misbranded or adulterated.
- Requires farm markets, farmers markets, and farm product auctions to register with the Director of Agriculture.
- Eliminates the retail food establishment licensing requirement that applies to persons and public entities that sell over-the-counter drugs, nutrients used in lieu of pharmaceuticals, and dietary supplements.
- Modifies existing exemptions from the requirement to be licensed as a retail food establishment and creates additional exemptions from the licensing requirement.
- Exempts a private home from the requirement to be licensed as a food service operation if not more than 115 meals per week are served to guests.

- Specifies in statute the uniform methodologies to be used in calculating the fees charged for issuing licenses to retail food establishments and food service operations.

- Requires a board of health to reduce its licensing fees by 20% if it fails to respond appropriately to surveys and requests for information from the Directors of Agriculture and Health.

- Requires a board of health that has overcharged for retail food establishment or food service operation licenses to reduce its next annual licensing fees by the overcharged amount.

- Creates a licensing category for mobile retail food establishments.

- Requires the state's Uniform Food Safety Code to be as specific as necessary for a license holder to know whether the holder is in compliance with the code.

- Requires the membership of each board of health to include at least one individual licensed to operate a food service operation.

- Declares an emergency.

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CONTENT AND OPERATION

Food processing establishments

(sec. 3715.021)

Under provisions of the Revised Code referred to as the Pure Food and Drug Law, the Director of Agriculture is required to adopt rules that establish, when not otherwise established by the Revised Code, standards for wholesale food establishments. A wholesale food establishment is a premises where food is processed, packaged, manufactured, or otherwise held or handled for sale or distribution at wholesale to persons other than the ultimate consumers. A wholesale food establishment includes, for example, the activities of a bakery, confectionery, cannery, bottler, warehouse, or distributor.

Under the bill, wholesale food establishments are to be regulated as "food processing establishments." The bill eliminates the provision specifying that the activities being regulated are those that involve sales to persons other than the ultimate consumers. At the same time, the bill excludes from regulation certain cottage food production operations, maple syrup and sorghum processors, and beekeepers who jar honey.

The bill modifies the duty of the Director of Agriculture to adopt rules by requiring that the rules be adopted in accordance with regulations adopted by the federal Food and Drug Administration. The bill replaces the duty to adopt rules establishing "standards" with a requirement to adopt rules that establish "good manufacturing practices."

Cottage food production operations

(secs. 3715.01 and 3715.021(A) and (H))

Under the bill, a cottage food production operation is a person who produces food items in the person's home. The home must be owner-occupied and the owner's primary residence. The residence may contain only one stove or oven used for cooking. The stove or oven must be designed for common residence usage and not for commercial usage and must be operated in an ordinary kitchen within the residence. The bill provides that the oven may be a double oven.

The food items that may be produced under the bill include bakery products that are not potentially hazardous foods, jams, jellies, candy, apple butter, and similar products defined by rules to be adopted by the Director of Agriculture. The rules are to be adopted in accordance with the Administrative Procedure Act (R.C. Chapter 119.) and cannot include potentially hazardous foods.

The bill prohibits a cottage food production operation from processing acidified foods, low acid canned foods, or potentially hazardous foods. A potentially hazardous food is described by the bill as a food that is natural or synthetic, with a pH level greater than 4.6 or a water activity value greater than 0.85, or that requires temperature control because it is in a form capable of supporting the rapid and progressive growth of infectious or toxigenic microorganisms, the growth and toxin production of *clostridium botulinium*, or, in raw shell eggs, the growth of *salmonella enteritidis*.

The bill requires a cottage food production operation to label each of its food products, except apple butter. The label must include the following information:

(1) The name and address of the business of the cottage food production operation;

(2) The name of the food product;

(3) The ingredients of the food product, in descending order of predominance by weight;

(4) The net weight and volume of the food product, both in United States and metric measurements;

(5) The following statement, in ten-point type: "The product is home produced."

Maple syrup, sorghum, and honey processors

(sec. 3715.021)

The bill excludes from regulation as a food processing establishment all of the following:

Maple syrup: A processor of maple syrup who boils sap when a minimum of 75% of the sap used to produce the syrup is collected directly from trees by that processor.

Sorghum: A processor of sorghum who processes sorghum juice when a minimum of 75% of the sorghum juice used to produce the sorghum is extracted directly from sorghum plants by that processor.

Honey: A beekeeper who jars honey when a minimum of 75% of the honey is from that beekeeper's own hives.

The exempt processors and beekeepers are required by the bill to label each of their food products. The label must include all of the following information:

(1) The name and address of the business of the processor or beekeeper;

(2) The name of the food product;

(3) The ingredients of the food product, in descending order of predominance by weight;

(4) The net weight and volume of the food product, both in United States and metric measurements.

Voluntary inspections

(sec. 3715.021(F) and (G))

Under the bill, an exempt maple syrup or sorghum processor or beekeeper is authorized to request that the Director of Agriculture conduct a voluntary inspection of the processor's or beekeeper's facilities. If the inspection is passed, the bill permits the processor or beekeeper to place on the label of each food product a "seal of conformity and inspection" of the Department of Agriculture. The bill requires the Director of Agriculture to adopt rules that establish the standards that must be satisfied to be permitted to use the seal of conformity and inspection. The rules must be adopted in accordance with the Administrative Procedure Act and include the seal that is to be used.

Products acceptable for sale

(sec. 3715.021(E))

If the food products offered by a cottage food production operation, maple syrup or sorghum processor, or beekeeper meet the bill's identification and labeling requirements, the bill provides that the products are acceptable for sale at retail food establishments and food service operations.

Food sampling for misbranding or adulteration

(sec. 3715.021(C))

The bill provides that all food products are subject to food sampling conducted by the Director of Agriculture, or a representative the Director authorizes, to determine whether a food product is misbranded or adulterated. The bill specifies that the food sampling provision extends to the food products produced and packaged by a cottage food production operation and all packaged maple syrup, sorghum, and honey.

Registration of farm markets, farmers markets, and farm product auctions

(secs. 3717.01 and 3717.041)

The bill requires the Director of Agriculture to adopt rules that establish procedures for registration of farm markets, farmers markets, and farm product auctions. The rules must be adopted in accordance with the Administrative Procedure Act.

Exemptions and exclusions from retail food establishment licensing

(secs. 3717.01(C) and 3717.22)

Under current law, each person or government entity that operates a retail food establishment must obtain a license for the establishment, unless a specific exemption or exclusion applies. For purposes of determining who is subject to licensure, current law defines a retail food establishment as a premises or part of a premises where food, over-the-counter drugs, nutrients designed for use in lieu of pharmaceuticals, and products designed for use as dietary supplements are stored, processed, prepared, manufactured, or otherwise held or handled for retail sale.

The bill modifies the existing exemptions and exclusions from licensure and creates additional exemptions and exclusions, as follows:

Nonprescription drugs, nutrients, and dietary supplements: The bill eliminates the requirement to be licensed as a retail food establishment when engaging in the retail sale of over-the-counter drugs, nutrients designed for use in lieu of pharmaceuticals, and products designed for use as dietary supplements. The exemption is by eliminating these items from the statutory definition of retail food establishment.

Displays of less than 100 cubic feet: The bill modifies the existing exemption from licensure as a retail food establishment that applies to an operation with commercially prepackaged foods that are not potentially hazardous and contained in displays of less than 100 cubic feet. First, the bill specifies that the space limitation is a limit on the total space of all displays. Second, for consistency, the bill refers to establishments rather than operations and excludes mobile retail food establishments from the exemption.

Displays of less than 500 square feet: The bill creates an exemption for an establishment that offers food contained in displays of less than 500 square feet. The establishment must be classified as risk level I according to rules establishing licensing categories for retail food establishments. The establishment can offer food for sale at retail not more than six months in each calendar year.

Farmers markets: The bill creates an exemption from licensure for a person at a farmers market. The market must be registered with the Director of Agriculture and the person may offer only the following:

--Fresh unprocessed fruits or vegetables;

--Products of the cottage food production operations that the bill exempts from regulation as food processing establishments;

--Maple syrup, sorghum, or honey from locations exempt from regulation under the bill as a food processing establishment;

--Commercially prepackaged food that is not potentially hazardous food. The food must be contained in displays, the total space of which equals less than 100 cubic feet.

Roadside stands: The bill modifies the existing exemption for roadside markets that offer only fresh and unprocessed fruits and vegetables. First, it refers to the "markets" as "roadside stands." Second, it specifies that unprocessed means not being processed beyond merely rough trimming and rinsing.

Nonprofit organizations: The bill modifies the existing exemption for nonprofit organizations that raise funds by selling displayed food for not more than seven consecutive days or more than 52 separate days per year. The modification consists of eliminating the limitation to "displayed" foods.

Cottage food production operations: The bill exempts a cottage food production operation if it offers its products directly to the consumer from the site where the products are produced.

Maple syrup, sorghum, and honey processors: The bill exempts the maple syrup and sorghum processors and beekeepers described above, if they offer only maple syrup, sorghum, or honey directly to the consumer from the site where those products are processed.

Egg processors: The bill exempts a person who annually maintains 500 or fewer birds, if the person offers the eggs from those birds directly to the consumer from the location where the eggs are produced.

Chicken processors: The bill exempts a person who annually raises and slaughters 1,000 or fewer chickens, if the person offers dressed chickens directly to the consumer from the location where the chickens are raised and slaughtered.

Nonamenable meat processors: The bill exempts a person who raises, slaughters, and processes the meat of nonamenable species, if the person offers the

meat directly to the consumer from the location where the meat is processed. Examples of nonamenable species include bison, domestic rabbits, domestic deer, pheasant, quail, and captive raised waterfowl.

Farm product auctions: The bill exempts a registered farm product auction that offers for sale only the products of persons exempt from licensure as described above with respect to cottage food production operations and processors of maple syrup, sorghum, honey, eggs, chicken, and nonamenable meat.

Prepackaged beverage retailers: The bill exempts operations that, with respect to offering food for sale, offer only prepackaged alcoholic beverages or prepackaged nonpotentially hazardous beverages.

Prepackaged beverage and food retailers: The bill exempts operations that, with respect to offering food for sale, offer only prepackaged alcoholic beverages, prepackaged nonpotentially hazardous beverages, or commercially prepackaged food that is not potentially hazardous food. The prepackaged food must be contained in displays, the total space of which equals less than 300 cubic feet.

Festivals and celebrations: The bill exempts a person who offers certain foods for sale at a festival or celebration that is organized by a political subdivision of the state. The festival or celebration cannot last longer than seven consecutive days. The only foods that can be offered are fresh unprocessed fruits or vegetables, products of persons exempt under the bill from being regulated as food processing operations, and commercially prepackaged food that is not potentially hazardous. The commercially prepackaged food must be contained in displays, the total space of which equals less than 100 cubic feet.

Farm markets: The bill exempts a farm market that is registered with the Director of Agriculture. The only foods that can be offered for sale are the same as those that can be sold at exempt festivals and celebrations, as well as cider and other juices manufactured on site at the farm market and the products or items of the processors of eggs, chicken, and nonamenable meat that are exempt from licensure as described above.

Exemption from food service operation licensing

(sec. 3717.42)

Current law requires each food service operation to be licensed. The requirement applies to any place, location, site, or separate area where food intended to be served in individual portions is prepared or served for a charge or required donation. Certain places are exempt from licensure, including any

private home in which the food that is prepared or served is intended only for the related individuals who reside in the home and their nonpaying guests.

The bill continues the current exemption regarding private homes and establishes an exemption for a private home that prepares and offers food to guests, without reference to whether the guests are paying or nonpaying guests. For the exemption to apply, the home must be owner-occupied, the meals must be served on the premises of that home, and the number of meals served cannot exceed 115 per week.

Calculation of licensing fees

(secs. 3717.07, 3717.25, and 3717.45)

Current law permits the licensor of retail food establishments and food service operations in a health district to charge a fee for issuing and renewing a retail food establishment or food service operation license. In most cases the licensor is the board of health. If the board of health is not capable of enforcing the licensing law, the Director of Agriculture acts as the licensor of retail food establishments and the Director of Health acts as the licensor of food service operations.

The licensor can use the fees only for the administration and enforcement of the statutes and rules that apply to retail food establishments and food service operations. The amount of the fees charged must be based on the cost of regulating retail food establishments and food service operations. The cost of that regulation is determined in accordance with uniform methodologies established in rules adopted by the Director of Agriculture and Public Health Council. Recommendations from advisory boards or other entities representing the interests of retail food establishments and food service operations must be considered when establishing licensing fees. Increases in licensing fees for vending machine locations are limited to the annual inflation rate.

The bill eliminates the provisions of current law regarding the adoption of rules establishing uniform methodologies for use in establishing licensing fees. Instead, the bill specifies in statute the methodologies that must be used.[1] Under the bill, the provision that limits the amount of the fees to the cost of regulation in general is replaced by a provision that limits the fees to the actual cost of conducting inspections.

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[1] *Amendments are necessary to clarify that the bill's cost methodologies apply to the licensing of both retail food establishments and food service operations.*

Under the methodologies specified in the bill, a licensor is required to use data from the licensing period immediately preceding the time when the licensor is calculating costs. For purposes of determining costs, the bill requires each licensor to calculate by using the statewide average number of establishments inspected by sanitarians.

The bill requires the licensor to calculate costs for the following components:

(1) Retail food establishments and food service operations classified as risk level I, II, III, IV, and V;

(2) Mobile retail food establishments and mobile food service operations;

(3) Temporary retail food establishments and temporary food service operations;

(4) Vending machine locations.

Calculation of inspection costs: The licensor is required by the bill to calculate the cost attributable to each component for conducting inspections. The licensor is required to use a form prescribed by the Directors of Health and Agriculture that includes the following data:

(1) A list of all inspecting sanitarians who worked in the component;

(2) The total hours worked in the component by each inspecting sanitarian;

(3) The total hours that each inspecting sanitarian worked in the licensing period immediately preceding the time when the licensor is calculating costs;

(4) The total annual wages or salary paid to each inspecting sanitarian;

(5) The total amount for fringe benefits paid on behalf of each inspecting sanitarian;

(6) The total travel costs for each sanitarian;

(7) The support costs for the component, as determined by one of the following methods:

--Using actual support cost items, such as salary and fringe benefits of the health commissioner, the director of environmental health, supervisory staff, and clerical staff, and cost of utilities, rent, supplies, equipment, liability insurance, and training;

--Using a cost rate of 30% of the wages or salaries and fringe benefits of inspecting sanitarians attributable to the component;

--Applying to the component a negotiated cost rate and calculation method approved by a federal agency for the licensor.

(8) The sampling and laboratory costs for the component other than the costs for the collection and bacteriological examination of food or water samples, or similar services specified in rules adopted under the bill;

(9) Funding for the component that includes revenues obtained from licensing fees and penalty fees;

(10) Any known increases in costs or expenses for such items as rent, utilities, equipment, and current personnel, as well as the costs for additional personnel identified by the licensor after the performance of a personnel needs analysis by the Director of Health.

Calculation of license fees: The licensor is required by the bill to calculate license fees for each licensing category, as follows:

(1) Vending machine locations: Divide the category cost by the number of vending machine location licenses issued.

(2) Mobile food service operations: Divide the category cost by the number of mobile food service operation licenses issued.

(3) Temporary food service operations: Establish fees on a per event basis by dividing the category cost by the number of licenses issued or establish fees on a per day basis by dividing the category cost by the total number of days for which temporary licenses were issued. If a licensor elects to establish a noncommercial fee, the bill requires the category cost to be divided by the same number plus 50% of that number.

(4) Operations classified as risk level I, II, III, IV, and V: Establish fees by doing all of the following:

(a) Determine support costs according to one of the three methods specified above, and equally allocate support costs attributable to the risk level component by dividing the support costs of the component by the total number of licensees plus 50% of noncommercial operations classified by risk.

(b) Determine the total number of licensees in each risk level category. If the licensor elects to establish noncommercial categories, the bill requires that

total number in each category to be the number of commercial licensees plus 50% of the noncommercial licensees.

(c) Determine the number of standard inspection periods for each risk level category using the inspection time factor. The bill provides that the time factor equals the ratio of the average amount of time per inspection for all risk levels relative to the average time per inspection for the licensees that are classified as risk level I and have less than 10,000 square feet. The bill specifies the inspection time factor for food service operations as follows:

--Risk level I, less than 10,000 square feet: 1.00.

--Risk level I, 10,000 square feet or above: 1.88.

--Risk level II, less than 10,000 square feet: 1.25.

--Risk level II, 10,000 square feet or above: 2.03.

--Risk level III, less than 10,000 square feet: 1.64.

--Risk level III, 10,000 square feet or above: 4.84.

--Risk level IV, less than 10,000 square feet: 2.21.

--Risk level IV, 10,000 square feet or above: 5.16.

--Risk level V, less than 10,000 square feet: 2.84.

--Risk level V, 10,000 square feet or above: 6.09.

The bill provides that the number of standard inspection periods equals the minimum number of inspections required for each risk level category multiplied by the inspection time factor, the product of which is multiplied by the total number of licensees in each risk level category.

(d) Determine the total number of standard inspection periods by summing the standard inspection periods for all risk level categories.

(e) Determine the nonsupport cost per standard inspection period by subtracting the support cost from the total actual cost of the component, and divide this amount by the total number of standard inspection periods.

(f) Determine the nonsupport cost for each risk level category by using the following formula: A x B x C = The nonsupport cost for each risk level. For purposes of the formula, A equals the nonsupport cost per standard inspection

period, B equals the minimum number of inspections for the risk level category, and C equals the inspection time factor for the risk level category.

(g) Determine the maximum license fee that may be established by adding the nonsupport cost for each risk level category to the support cost per license issued.

Fee reductions due to board of health deficiencies

Current law requires each board of health to be surveyed by the Directors of Agriculture and Health to determine whether the board is qualified and has the capacity to administer and enforce the licensing requirements for retail food establishments and food service operations. The surveys must be conducted at least once every three years.

The bill requires a board to reduce its licensing fees if it fails to respond appropriately to a survey, as determined by the director who conducts the survey, or fails to comply with information reporting requirements within the time required. The fee reduction is to be applied to the licensing period that next ensues after discovery of the failure. The amount of the reduction is to be 20% of the amount that otherwise would have been charged.

Audits

(secs. 3717.10, 3717.25, and 3717.45)

Current law requires the Auditor of State to conduct an audit of each public office's activities during each fiscal year. Depending on which office is involved, the audit may be conducted annually or biennially.

The bill authorizes the Director of Health to request that the Auditor of State conduct an additional audit of a licensor of retail food establishments and food service operations if the Director has reasonable cause to believe that an additional audit is in the public interest.

If the Auditor of State, after conducting an audit, determines that a licensor has charged or is charging a licensing fee for retail food establishments and food service operations that exceeds the amount that should have been established based on the uniform methodologies specified in the bill, the licensor is required to reduce the fees it establishes for the next licensing period. The bill requires the reduction to be proportional to the overage.

Mobile retail food establishments

(sec. 3717.01(Q))

The bill establishes a licensing category of mobile retail food establishment. The bill describes such an establishment as one that is operated from a movable vehicle or other portable structure and that routinely changes location. If the establishment operates from any one location for more than 40 consecutive days, the establishment is no longer considered a mobile retail food establishment, and is subject to a licensure in a different category.

Uniform Food Safety Code

(sec. 3717.05)

Under current law, the administrative rules establishing standards for safe food handling and sanitation in retail food establishments and food service operations are compiled as the "Ohio Uniform Food Safety Code" for use by licensors in ensuring safe handling of food. If a model food code is established by the Unites States Food and Drug Administration, Ohio's code must be based on the most current version of the model code.

The bill requires the Ohio Uniform Food Safety Code to be as specific as necessary for the holder of a retail food establishment or food service operation license to determine whether the holder is in compliance with the code and what is required of the holder to maintain compliance with the code. As a means of compliance with this requirement, the bill provides that the code may contain or omit provisions that do not correspond to the federal government's model food code.

Licensing periods

(sec. 3717.01(P); Section 4)

Under current law, the annual licensing period for retail food establishments and food service operations is March 1 to the last day of February of the next year. The bill changes the licensing period to June 1 to May 31 of the next year. If a license issued before the bill's effective date is scheduled to expire February 28, 2002, the bill provides that the license remains valid until May 31, 2002.

Board of health membership

(secs. 3709.03, 3709.05, and 3709.07; Section 3)

Current law requires that a five-member board of health be appointed for each general and city health district. In the case of the board of health appointed for a general health district, as well as the board of health of a combined city and general health district, current law requires that one member of the board be a physician.

The bill requires that at least one member of the board of health in each general and city health district be an individual who holds a current license to operate a food service operation. The member must be recommended for appointment by the restaurant association serving the region in which the district is located.

If, on the bill's effective date, a board of health does not include an individual licensed to operate a food service operation, the appointment of such an individual is to be made when the first vacancy occurs after the bill's effective date. Before that appointment, the bill specifies that the board is not required to have a member who holds a food service operation license.

Liquor permits

(secs. 4303.021, 4303.13, 4303.14, 4303.15, 4303.18, 4303.181, 4303.182, and 4303.183)

Under current law, certain restaurants are eligible to apply for a permit to sell alcoholic beverages. As used in this law, a "restaurant" is a place located in a permanent building provided with space and accommodations wherein, in consideration of the payment of money, hot meals are habitually prepared, sold, and served at noon and evening, as the principal business of the place. The statutes include references to such restaurants being licensed as food service operations.

The bill specifies that a restaurant meeting the same definition may apply for a liquor permit if it is licensed as a retail food establishment rather than a food service operation.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	06-19-01	p. 674

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