Alan Van Dyne *Legislative Service Commission*

Sub. S.B. 136*

124th General Assembly
(As Reported by S. Health, Human Services & Aging)

Sens. Wachtmann, Ryan

BILL SUMMARY

? Exempts certain cottage food production operations and processors of limited amounts 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.

? 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 and to be inspected.

? 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.

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* *This analysis was prepared before the report of the Senate Health, Human Services and Aging Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

? 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.

? Limits certain costs that may be included in calculating the fees charged for issuing licenses to retail food establishments and food service operations.

? Requires a board of health to pay a daily fine and ultimately reduce its licensing fees by 20% if it fails to provide the Directors of Agriculture and Health a timely report on its annual licensing fee calculations.

? 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 agencies that adopt the Uniform Food Safety Code to issue binding "letters of opinion" when recommended by the Retail Food Safety Advisory Council as the result of comments or requests received from the public.

? Permits a board of health to withdraw from acting as the licensor of retail food establishments or food service operations and establishes procedures for appointing an alternative licensor.

? Requires the membership of each board of health to include at least one individual who represents the activities that are licensed by the board.

? Establishes in each health district a health district licensing council comprised of representatives of each licensed activity and makes the council responsible for selecting the board of health member who represents the activities that are licensed by the board.

? 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. It excludes from regulation certain cottage food production operations, maple syrup and sorghum processors, and beekeepers who jar honey. With respect to the distribution of food, the bill specifies that the activities being regulated are those that involve distribution to another location.

The bill modifies the duty of the Director of Agriculture to adopt rules by requiring that the rules conform with or be equivalent to the standards for food established by the federal Food and Drug Administration. The bill expands the duty to adopt rules establishing standards by requiring the adoption of rules that establish "good manufacturing practices."

Cottage food production operations

(secs. 3715.01 and 3715.025)

Under the bill, a cottage food production operation is a person who, in the person's home, produces food items that are not potentially hazardous food. 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 allows the oven to be a double oven.

The food items that may be produced under the bill include bakery products, jams, jellies, candy, fruit butter, and similar products specified in 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. With respect to processing, the bill prohibits a cottage food production operation from processing acidified foods, low acid canned foods, or potentially hazardous foods.

For purposes of the provisions described above, the bill defines a "potentially hazardous food" as a food that is natural or synthetic, to which any of the following apply:

(1) It has a pH level greater than 4.6 when measured at 75 degrees Fahrenheit or 24 degrees Celsius;

(2) It has a water activity value greater than 0.85;

(3) It 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 the case of raw shell eggs, the growth of *Salmonella Enteritidis*.

Labeling

(sec. 3715.023)

The bill requires a cottage food production operation to label each of its food products. 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. 3715.024)

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. 3715.024)

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. 3715.023(C))

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 food products that a retail food establishment or food service operation may offer for sale or use in preparing and serving food.

Fruit butter from festivals and celebrations

(sec. 3717.023(B))

The bill provides that its labeling requirements do not apply to fruit butter produced at certain festivals and celebrations. For the exception to apply, the festival or celebration must be organized by a political subdivision of the state and the fruit butter must be sold during the festival or celebration from the production site.

Food sampling for misbranding or adulteration

(secs. 3715.022, 3715.59, and 3715.60)

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.

The bill requires the Director to adopt rules as the Director considers necessary to establish standards for food sampling and procedures for administering the bill's food sampling requirements. The rules are to be adopted in accordance with the Administrative Procedure Act (R.C. Chapter 119.). The bill specifies that a component of the Director's food sampling program may include the authority under existing law to conduct sample analyses of food, food additives, and food packaging materials.

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 that a premises or part of a premises 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.

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.

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 and, if required to be licensed, would be classified as risk level I according to rules establishing licensing categories for retail food establishments. The establishment can offer the food for sale at retail not more than six months in each calendar year.

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 or at a registered farm product auction.

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 or at a registered farm product auction.

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 or at a registered farm product auction. Examples of nonamenable species include bison, domestic rabbits, domestic deer, pheasant, quail, and captive raised waterfowl.

Beverage retailers: The bill exempts establishments that, with respect to offering food for sale, offer only alcoholic beverages or prepackaged beverages that are not potentially hazardous. It also exempts establishments that offer only fountain beverages that are not potentially hazardous.

Beverage and prepackaged food retailers: The bill exempts establishments that, with respect to offering food for sale, offer only alcoholic beverages, prepackaged beverages that are not potentially hazardous, or commercially prepackaged food that is not potentially hazardous. The prepackaged food must be contained in displays, the total space of which equals less than 100 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 cottage food operations; maple syrup, sorghum, or honey produced by the small producers exempt under the bill from being regulated as food processing establishments; 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.

Farmers markets: The bill creates an exemption from licensure for a person at a farmers market, which is described as a location where producers congregate to offer fruits, vegetables, and other items for sale. The market must be registered with the Director of Agriculture and the person may offer only one or more of the following:

--Fresh unprocessed fruits or vegetables;

--Products of cottage food production operations;

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

--Commercially prepackaged food that is not potentially hazardous. The 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 a farmers market, as well as either of the following:

--Cider and other juices manufactured on site at the farm market;

--The products or items of the processors of eggs, chicken, and nonamenable meat that are exempt from licensure as described above.

Farm product auctions: The bill exempts a registered farm product auction, which is described as a location where agricultural products, including food products, are offered for sale at auction. The items that may be sold at a farm product auction include one or more of the following:

--Fresh unprocessed fruits or vegetables;

--Products of cottage food production operations;

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

--The products or items of the processors of eggs, chicken, and nonamenable meat that are exempt from licensure as described above.

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

(sec. 3717.221)

The bill permits a farmers market, farm market, or farm product auction to register with the Director of Agriculture. The bill requires that each registered entity be inspected by the Director. Inspections are to occur at a frequency the Director considers appropriate and must be conducted in accordance with sanitation standards established by rule. The Director is required to adopt rules as necessary to administer the registration and inspection program. The rules are to be adopted in accordance with the Administrative Procedure Act (R.C. Chapter 119.).

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

(sec. 3717.07)

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.

Under the bill, the rules establishing the uniform methodologies for calculating licensing fees must include provisions that do all of the following:

(1) Provide for calculations to be made according to fiscal years rather than annual licensing periods, which begin in March;

(2) Limit the direct costs that may be attributed to the use of sanitarians by establishing appropriate statewide averages that may not be exceeded;

(3) Limit the indirect costs that may be included in the calculation of fees to an amount that does not exceed 30% of the cost of the licensing program;

(4) Provide for a proportionate reduction in fees if a licensor included anticipated costs in the immediately preceding fiscal year and the total amount of the anticipated costs was not incurred;

(5) Provide for a proportionate reduction in the fees if it is discovered by the Auditor of State or through any other means that the licensor charged more than should have been charged.

Review of fee calculations

(sec. 3717.071)

The bill requires the Directors of Agriculture and Health to prescribe forms for use in calculating licensing fees and requires licensors to use the forms in making the calculations. If the licensor is a board of health, the bill requires the board to submit the form to the appropriate Director not later than the first day of the fiscal year in which the fees will be charged. The bill provides that when a form is mailed, it is considered to have been submitted on its postmark date.

The Director must review each form received from a board of health to determine if the board has calculated its fees in accordance with the uniform methodologies. The Director may request that the Auditor of State conduct an audit to determine if the board's licensing fees are appropriate. The bill specifies that the requested audit is in addition to the annual or biennial audits the Auditor conducts of each public office. It also specifies that the cost of the requested audit is the responsibility of the board of health.

If at any time the Director has reasonable cause to believe that a different audit is in the public interest, the Director may request that the Auditor of State conduct the audit. The bill provides that this audit, too, is the responsibility of the board of health.

Penalties

(sec. 3717.071(C))

The bill establishes monetary penalties to be imposed on a board of health that fails to submit to the Directors the forms it used to calculate its licensing fees. The penalties increase according to the number of days the board is late in submitting the forms and the frequency at which the board repeats its failure. The bill prohibits a board from including any part of the cost of the penalty in the fees it charges retail food establishments and food service operations.

Under the bill, if a board of health fails to submit the forms as required, and the failure has occurred not more than twice in the immediately preceding five-year period, the board is subject to the following penalties:

(1) If the form is late by one but not more than five working days, a fine of $50 for each working day the form is late;

(2) If the form is late by six working days but not more than ten working days, a fine of $100 for each working day the form is late;

(3) If the form is late by more than ten working days, the board is required to reduce its licensing fees by 20% for the next succeeding fiscal year.

If a board fails to submit the forms and the failure has occurred more than twice in the immediately preceding five-year period, there is no daily fine. Instead, on the first day the form is late, the board is required to reduce its licensing fees by 20% for the next succeeding fiscal year.

Board of health withdrawal as licensor

(secs. 3717.11 and 3717.111)

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 Director conducting the survey may deny or revoke the board's authority to act as licensor.

The bill permits a board of health to withdraw from serving as the licensor of retail food establishment, food service operations, or both. Before withdrawing, the bill requires that the board provide written notice to the appropriate Director of its intent to withdraw. On receipt of the notice, the responsible Director is required by the bill to designate an alternative licensor for the health district served by the board. The alternative licensor must be a board of health that is qualified and has the requisite capacity to serve as alternative licensor. However, if a qualified and capable board is not available from a health district within reasonable proximity, the appropriate Director is required to act as the alternative licensor.

Under the bill, when a board withdraws as licensor, all valid licenses issued by that board for retail food establishments or food service operations, whichever have been affected, are to be treated as though issued by the alternative licensor. The licenses remain valid until scheduled to expire unless earlier suspended or revoked by the alternative licensor.

With respect to the fees charged by the withdrawing board of health, the bill provides that all unexpended fees are to be transferred to the alternative licensor. When a board of health is acting as the alternative licensor, the board must deposit the fees into a special fund it establishes for receipt of funds pertaining to the district for which it is acting as licensor. If the Director of

Agriculture is acting as licensor, the Director must deposit the fees in the state treasury's existing food safety fund. If the Director of Health is acting as licensor, the Director must deposit the fees in the existing general operations fund. All subsequent fees charged in the district by the alternative licensor are to be deposited in the same manner. Moneys deposited under these provisions must be used solely for the administration and enforcement of the appropriate licensing programs in the district for which the alternative licensor is acting as licensor.

Mobile retail food establishments

(secs. 3717.01(Q), 3717.23, 3717.27, and 3717.29)

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. The bill extends to mobile retail food establishments many of the provisions of existing law that apply to mobile food service operations. These provisions pertain to submission of license applications, information that must be included on each license issued, inspections conducted by licensors other than the one that issued the license, and procedures for appealing the suspension or revocation of a license.

Late license renewal penalty

(secs. 3717.23 and 3717.43)

Under current law, if a license renewal application is not filed with the licensor or postmarked on or before the first day of the licensing period, or, in certain cases, the first day of operation, the licensor is required to assess a penalty of 25% of the renewal fee. The bill limits the fee to the lesser of $50 or 25% of the renewal fee.

Ohio 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 federal Food and Drug Administration (FDA), Ohio's code must be based on the most current version of the model code.

If the FDA changes its model food code, corresponding changes must be made to Ohio's code. Current law requires the changes to be made not later than nine months after the FDA's action. The bill provides that the changes must be made not later than 12 months after the FDA's action.

Interpretations of the Ohio code

(secs. 3717.03 and 3717.041)

The bill requires the existing Retail Food Safety Advisory Council to review all comments on and requests for interpretation of the Ohio Uniform Food Safety Code. The bill provides that the comments and requests may be submitted by license holders or any other person or government entity. The comments and requests may be made publicly or anonymously. For purposes of accepting comments and requests at times other than Council meetings, the bill requires the Council to maintain and publicize a mailing address.

To assist in the uniform application of the rules adopted by the Director of Agriculture, Public Health Council, and Director of Health for retail food establishments and food service operations, the bill requires the issuance of joint "letters of opinion" when issuance is recommended by the Retail Food Safety Advisory Council. A letter of opinion must be issued not later than 60 days after the date the Council's recommendation is received. Each letter of opinion must provide a detailed interpretation of the rules being examined. Unless rules are adopted that override the interpretation expressed in a letter of opinion, the bill provides for the interpretation to be binding and requires that it be applied uniformly throughout Ohio.

Board of health membership

(secs. 3709.02, 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 represents the interests of the activities that are licensed by the board of health. This representative is to be selected by the health district licensing council, which the bill requires to be appointed in each city and general health district. The council must select an alternate member to serve if for any reason the original member is required to

abstain from voting on a particular issue being considered by the board. While serving on behalf of the original member, the alternate member has the same powers and duties as the original member.

The bill provides that its requirement that a board of health have a member selected by the health district licensing council does not affect the terms of the board members holding office on the bill's effective date. The first vacancy to occur after that date must be filled by a member selected by the council. Until that vacancy is filled, the council must ensure that at least one of its members attends all meetings of the board of health.

Health district licensing council

(sec. 3709.41)

The bill provides for the health district licensing council to be appointed by the same authority that appointed the board of health. The members of the council must include one representative of each activity for which the board of health operates a licensing program.

Initial appointments must be made not later 30 days after the bill's effective date. Members are to serve for terms of five years and may be reappointed. Vacancies must be filled in the manner provided for original appointment.

The health district licensing council is required to organize by selecting a chair and secretary from among its members. The council must adopt bylaws governing its meetings, the transaction of business, and voting procedures. The council is required to meet at least quarterly and at other times pursuant to the call of the chair or a majority of the council's members.

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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