



MARYLAND Department of Health

Larry Hogan, Governor · Boyd K. Rutherford, Lt. Governor · Robert R. Neall, Secretary

January 10, 2019

The Honorable Delores G. Kelley
Chair
Senate Finance Committee
3 East, Miller Senate Office Building
Annapolis, MD 21401-1991

The Honorable Shane E. Pendergrass
Chair
House Health and Government Operations
Committee
Room 241, House Office Building
Annapolis, MD 21401-1991

Re: Chapter 90 of the Acts of 2018 – Report of the Workgroup on the Licensing of Food Service Facilities

Dear Chairs Kelley and Pendergrass:

Pursuant to House Bill 1009 (Ch. 90 of the Acts of 2018), the Maryland Department of Health (the Department) is submitting this report of the activities and findings of the Workgroup on the Licensing of Food Service Facilities. This Workgroup, established by HB 1009, examined the current food service facilities laws and regulations as they apply to non-profit organizations and temporary food events. The Workgroup, which was chaired by the Department's Office of Food Protection and comprised of interested constituents, restaurant owners, and staff from local health departments, met five times in public during the summer and fall of 2018.

The attached report represents the independent views and recommendations of the Workgroup. If you should have any questions or comments, please contact Deputy Chief of Staff Webster Ye at (410) 767-6480 or webster.ye@maryland.gov.

Sincerely,

Robert R. Neall
Secretary

cc: Sarah Albert, Department of Legislative Services (MSAR #11631)



MARYLAND
Department of Health

**Report of the Workgroup on the Licensing of Food Service
Facilities**

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Introduction

In 2018 the General Assembly of Maryland passed House Bill (HB) 1009, Workgroup on the Licensing of Food Service Facilities. This legislation directs the Maryland Department of Health (the Department) to convene a workgroup to study, evaluate, and make recommendations concerning food service facility laws and regulations. HB 1009 also requires the Workgroup to submit a report of its findings and recommendations to the General Assembly of Maryland. This report summarizes the Workgroup's efforts, findings, and recommendations in fulfillment of its charge. The Workgroup is independent from the Department and the views expressed in this report do not necessarily represent the Department or the State of Maryland.

Background

Food service facilities are regulated under the provisions of statute (primarily Annotated Code of Maryland Article - Health-General, Title 21) and the Code of Maryland Regulations (COMAR) 10.15.03. These regulations are enforced by local health departments (LHDs). Local governments may choose to adopt stricter standards within their jurisdiction so long as they do not contradict State regulations.

Cottage Foods

The State allows the sale of certain homemade foods under the Cottage Food Law and under regulations (COMAR 10.15.03.27). Approved foods are non-potentially hazardous and include jams, jellies, baked goods, and candy. Cottage foods must be labeled with the name and address of the business, the name of the product, ingredient information, and a disclaimer that the business is not subject to Maryland's food safety regulations. Cottage food businesses are not licensed as food service facilities and are not inspected unless there has been a complaint or an outbreak.

Temporary Events

HB 1009 addresses how temporary events are regulated. Temporary food service facilities operate in conjunction with a fair, carnival, public exhibition, construction project, recreational facility, fundraising event, or similar event for typically no longer than two weeks. Temporary food service facilities are regulated under COMAR 10.15.03.25 and are exempted from certain regulations because those regulations are applicable primarily to food service facilities that have permanent physical infrastructure.

Public Health Rationale

The Department investigates and gathers information on food outbreaks in the State. Since 2011, the Department has identified eight outbreaks associated with serving food prepared in a private home at an outside event, such as office parties, luncheons, fundraisers, picnics, and potlucks. These eight outbreaks are associated with 189 illnesses, including seven hospitalizations. The most common factors that contribute to an outbreak include temperature controls during transportation, storing, and serving; cross contamination; inadequate hand washing; and using improvised spaces for food preparation or handling (such as break rooms or meeting rooms). Even if foods are properly prepared, temporary food events have unique challenges that may warrant additional considerations. Regulations are one of the tools used by the State to ensure

food is properly prepared, stored, and served in order to protect the health of consumers.

Charge

The legislature elected to amend HB 1009 (2018) to establish a Workgroup on the Licensing of Food Service Facilities (the Workgroup). The bill charges the Workgroup to:

...study, evaluate, and make recommendations concerning whether:

- (1) Certain entities, including charitable organizations, churches, and other nonprofits, should be exempt from the requirement to obtain a food service license under Title 21, Subtitle 3 of the Health – General Article;*
- (2) Special circumstances, including circumstances in which food is prepared in a kitchen in a private home for certain purposes, may warrant an exemption from the requirement to obtain a food service license under Title 21, Subtitle 3 of the Health – General Article; and*
- (3) Food service facility laws may be simplified or clarified.*

In the summer of 2018, the Department convened a group of seven individuals representing nonprofit organizations, retail food industries, LHDs, and other interested individuals. The meetings were open to the public in compliance with the Open Meetings Act. The Workgroup met five times from July through October.

Scope of Issues

Definition of Organizations Discussed in the Workgroup

Under current Maryland law, bona fide nonprofit organizations (those with a recognized current legal tax-exempt status), including charitable organizations such as churches, are defined as *excluded organizations* if they do not serve food to the public more than four days per week (except for once a year in which food may be served for up to 14 days; Health-General §21-301). Excluded organizations can make either (1) a non-rescindable decision to operate with a license in full compliance with COMAR 10.15.03, or (2) a decision to operate without a license. If an *unlicensed excluded organization* serves only non-potentially hazardous foods at an event, the food preparation and serving areas are not considered a food service facility and are exempt from applicable regulations. However, if potentially hazardous foods are served, an unlicensed excluded organization must still comply with most of the food service facility regulations (see COMAR 10.15.03.26B-F). If a bona fide nonprofit organization serves food to the public more than four days per week (or holds more than one event lasting longer than 14 consecutive days involving food service per year), then the organization is required to obtain a food service facility license.

Temporary Food Event Licensing

Permits for temporary food events (defined as a temporary food service facility in Health-General §21-309(a)(4)) are valid for a period of no more than 14 consecutive days or 30 consecutive days if the temporary food service facility is a volunteer fire company. This limitation can be burdensome for organizations that sponsor recurring temporary events, which

must reapply for new permits every two weeks. The application for a permit also requires the applicant to disclose what will be served, which may or may not be known at the time of the application.

Public vs Private Events

“Public event” includes events that are open to the public (whether or not a fee is charged) or advertised as being open to the public. “Public event” is also defined to exclude private parties, events restricted to organization members, or other events that restrict the general public from attending.

Whether an event is public or private determines how it is regulated. The definition of “food service facility” excludes kitchens in private homes where food is prepared at no charge for guests in the home or a social gathering that is a private event. In other words, private meetings are not regulated by the State.

It can be difficult to classify some events as public or private, such as church events that are open to anyone who chooses to associate themselves with the church by attending.

Home Preparation of Foods and Potentially Hazardous versus Non-Potentially Hazardous Foods

The Workgroup also spent considerable time discussing the differences between potentially hazardous and non-potentially hazardous foods in the context of the types of foods served at events held by bona fide nonprofit organizations. There were comments from more than one Workgroup member about why certain foods could be served only with time and temperature requirements (or could not be served at all). There was also discussion about which types of foods could or could not be prepared in unlicensed or home kitchens.

Potentially hazardous foods are those that require temperature controls to prevent the growth of infectious or toxigenic microorganisms that could cause illness. To determine if a food is potentially hazardous or not, both the moisture (water activity) and acidity (pH) must be determined, and in some cases laboratory testing may be necessary. While some foods can be easily identified as potentially hazardous by their temperature control requirements (such as baked dishes), other foods are not as obvious. For example, hard-boiled eggs that are air-cooled are not potentially hazardous, but water-cooled hard boiled eggs are.

Non-potentially hazardous foods can be offered for sale as cottage foods and served to the public in a wider array of venues, including bake sales, farmers’ markets, and public events, because they have little or no risk of causing illness. Cottage foods can be prepared in a home kitchen without the need for a license.

Workgroup members asked about the preparation of potentially hazardous foods in home kitchens for events sponsored by bona fide nonprofit organizations. For private events, there are no restrictions or licensing requirements. However for public events, potentially hazardous foods prepared in a private home kitchen cannot be served.

It was noted that preparing potentially hazardous foods requires more controls to prevent illness

due to either cross-contamination, improper handling, or inadequate temperature control, and this led to additional Workgroup discussion around the idea of training requirements for volunteers wishing to prepare food at their homes. The discussion also included a consideration of requirements for those volunteers to take a certified food safety course or be trained by an employee of the organization that is certified in food safety.

The Workgroup also received information about requirements in other states, which vary in their approaches to foods prepared in private homes (see Appendix II, Regulation of Food Prepared in Private Homes in Other States).

Related Issues

Several issues were discussed that did not directly address the main charge of the Workgroup. However, due to their connection to temporary food events, the Workgroup notes the following topics for future discussion or consideration by the Department.

Caterers

The Workgroup raised the issue of caterers who provide food at temporary events hosted by charitable or religious organizations. Members of the Workgroup noted that there would be some inconsistency if the Workgroup recommended that foods prepared in a home kitchen (which are not licensed or inspected) could be allowed without a permit, but caterers (who in most cases are associated with commercial food service facilities that are licensed and inspected) would still need to submit a separate permit for the same event.

Currently some jurisdictions (but not all) require a temporary food event permit, and not all jurisdictions license caterers. The Workgroup discussed whether such events should require licensure; the justification for licensure primarily relates to the ability of the local health department to rapidly respond in the event of a complaint or outbreak.

After extensive discussion, the Workgroup recommended that the Department examine the issue of catering licensure generally, and specifically with respect to the issues in this report, including requirements for temporary events.

Different Standards for Donated Food

The Workgroup also discussed issues of food donations to specific groups where there may be relaxation of the licensure requirements. Under current regulations (COMAR 10.15.03.02(B)(34)), potentially hazardous food prepared in a private kitchen can be served to unemployed, homeless, or other disadvantaged populations even when the private kitchen is not licensed as a food service facility (although donated foods served to these groups must still be wholesome and unadulterated). However, private kitchens cannot be used to prepare or provide potentially hazardous foods to other groups at public events.

Findings & Recommendations

Outreach and Training

The Workgroup recognized the need for increased awareness of proper safe food handling procedures. Organizations may not always be familiar with food safety laws and regulations and what is required of them to safely and legally host a temporary event. Making it easier for individuals and organizations to understand the requirements will likely lead to increased planning with the local health department and fewer incidents of noncompliance. The Department must continue to work with local health departments to emphasize risk-based enforcement strategies and better serve the needs of organizations who wish to host temporary food events but are not familiar with all food and safety laws and regulations.

Recommendation 1 - The Maryland Department of Health should standardize the application process and enforcement of temporary food events across local jurisdictions by Spring 2020.

While the Department does standardize enforcement generally among local health departments, specific training on temporary food events is warranted due to the unique challenges and varied levels of experience among host organizations. The Workgroup encourages the Department to provide additional training on best practices that protect food safety while being sensitive to the limited resources, facilities, and capacities of the hosting charitable organization. Standardizing the interpretation and enforcement of the food safety regulations across jurisdictions will facilitate sharing of best practices and a consistent statewide regulatory environment.

Recommendation 2 - The Maryland Department of Health should work with local health departments to develop model guidelines for temporary food events that can be used by local health departments and members of the public by Spring 2019.

Clearly written, plain-language guidelines should list the specific steps that need to be taken. Diagrams, checklists, and other tools can be used to ensure they are easy to use. The guidelines should include information on use of time-only or temperature controls. The Department and local health departments are urged by the Workgroup to distribute these guidelines widely, including a special emphasis on smaller organizations and through both online and other physical means. The Workgroup also encouraged the Department to look at ways of providing these materials, and the application process, through online resources.

Recommendation 3 - The Maryland Department of Health should improve and expand its outreach, education, and resource materials for excluded organizations.

The Workgroup spent considerable time discussing how the Department could improve its outreach, education, technical assistance, and resource materials for excluded organizations that are planning or holding events that include foods. The suggestions included:

- Providing a plain-language list of applicable regulations;
- Training on food safety risks and safe handling of potentially hazardous foods;
- Guidance on advertising an event as public versus private and the different regulations applicable to each event type;

- Checklists, diagrams, and other materials to help with the setup and operation of a temporary food event; and
- Distributing materials and resources broadly, including a special emphasis on smaller organizations, through both online and other physical means.
- Providing online resources for application processes.

A concerted effort by the Department and local health departments can ensure that excluded organizations across the State will be knowledgeable about both food safety regulations and how to safely operate a community event in compliance with those regulations. By working more closely to address the specific concerns of excluded organizations, the Department can facilitate the continued success of community events by helping organizers use best practices for safe food preparation and handling.

Regulations

Based on their findings, the Workgroup recommends the following changes to the regulations in COMAR 10.15.03. These changes should be made by the Maryland Department of Health, with input from bona fide nonprofit organizations, local health departments, and other interested stakeholders such as the Maryland Restaurant Association, by Fall 2019. In addition, the Department should strive to simplify and clarify regulations whenever possible.

Recommendation 4 - Amend and clarify regulations for bona fide nonprofit organizations pertaining to temporary food events to extend the length of the permit, clarify the definition of “similar gatherings,” and allow recurring temporary events with a good record of compliance to be inspected less frequently.

The Workgroup struggled to understand the regulatory distinctions imposed on all bona fide nonprofit organizations, those that are excluded that are licensed, and those that are unlicensed, if they hold a temporary event that involves food service. The Workgroup noted that because it had struggled to understand this framework, it was likely that the public (and in some cases, local health departments) have struggled as well. For example, it was not always clear to the Workgroup in what circumstances an excluded licensed or unlicensed entity was required to obtain a temporary event permit. In some cases, this was not clear to the local health departments, either, leading to inconsistent interpretations and practices across the State.

The Workgroup believes that allowing all temporary event permits to last up to 30 consecutive days (not just those hosted by volunteer fire companies) will simplify the regulations and reduce the paperwork burden for recurring events. This change will first require a statutory change (see *Statutory Changes* below). Unlicensed excluded organizations are not required to obtain a temporary food service facility license and are subject to compliance with COMAR 10.15.03.26C, provided that food is served no more than 4 days per week, except that once a year food may be served for up to 14 consecutive days.

The definition in Health-General §21-309(a)(4) of “temporary food service facility” describes a food service facility that operates in conjunction with a fair, carnival, public exhibition, construction project, recreational facility, fundraising event, or “similar gathering.” “Similar gathering” is vague and often a source of confusion for hosts of temporary food events as well as

local health departments. Clarifying or removing this term would ensure consistent standards for temporary food service facilities. The Workgroup recommends the amendment of Health-General §21-309(a)(4) to read, “in conjunction with, *but not limited to*”: This would allow local health departments some regulatory flexibility when processing temporary food service facility permit applications. Alternatively, the Workgroup recommended that local health department standardization (see Recommendation 1) include training in the interpretation of “similar gathering.”

The Workgroup recommends that if a certified food manager is on site, and the organization has successfully hosted similar events in the past, local health departments should be able to (at their discretion) relax the requirements for a required routine inspection (although inspections would still be conducted in the event of an outbreak). While requiring a certified food manager at all temporary events is not practical, the Workgroup believes a certified food manager can proactively work to ensure safe food handling procedures are used.

Recommendation 5 - Amend regulations on excluded organizations to allow licensing decisions to be rescinded and increase allowable time or frequency that an excluded organization may serve food.

An excluded organization’s decision to operate with a license in full compliance with COMAR 10.15.03 is currently non-rescindable. The Workgroup does not believe this limitation is justified or serves to protect health and safety. This change will first require a statutory change (see *Statutory Changes* below). In addition, the limitations on how often or how long an excluded organization may serve food should be relaxed to provide greater flexibility.

Recommendation 6 - Amend regulations to exempt excluded organizations from restrictions on serving potentially hazardous foods prepared in private kitchens if certain food safety measures are taken.

Licensing and event permitting are two commonly used mechanisms to promote food safety, but in some situations other strategies may be more effective and less burdensome on organizations that are not familiar with food safety laws and regulations, such as bona fide nonprofit organizations. The Workgroup considered whether, if adequate precautions are taken, excluded organizations should be allowed to serve potentially hazardous foods prepared in private kitchens. Ultimately, the Workgroup supported the idea of allowing potentially hazardous foods to be prepared in private kitchens for service at their public events, but only under the following conditions: (1) a certified food manager is at the event and trains food preparation workers in safe food handling practices prior to preparing any foods, (2) the event manager keeps a record of the foods served and who prepared each food, (3) signage clearly indicates the foods were prepared in a facility not subject to inspection, and (4) local health departments are notified of the event in advance.

This approach would shift more of the responsibility to the excluded organizations to ensure food safety. Some members and public attendees expressed concerns that proper food safety procedures might not be followed, but others pointed out that it is likely that potentially hazardous foods are being prepared and served at events already, but the Department is neither

informed nor aware of these. Pairing regulatory changes that facilitate compliance with strong education and outreach efforts can raise awareness of food safety practices in private kitchens and can help connect excluded organizations to local health departments for further resources and assistance. Ongoing and positive communication between the local health department and the excluded organization will be necessary for this to be successful.

The Workgroup also heard concerns that if a private home that is preparing foods is on a private well, the drinking water should have some verification of being monitored.

Statutory Changes

The Workgroup recommends the following statutory changes associated with recommendations 4, 5, and 6:

- Change the definition of excluded organizations to allow food to be served to the public for up to 30 consecutive days no more than once per year (Health-General §21-301).
- Allow excluded organizations to rescind a decision to be licensed or unlicensed (Health-General §21-304).
- Allow temporary food event permits to be valid for up to 30 consecutive days (Health-General §21-309).
- Give the Department authority to promulgate regulations to allow an excluded organization (whether licensed or unlicensed) to serve potentially hazardous foods prepared in a private kitchen if: (1) a certified food manager is at the event and trains food preparation workers in safe food handling practices prior to preparing any foods, (2) a record of the foods served and who prepared each is kept by the event manager and is available to the Department upon request for at least six months, (3) signage clearly indicates the foods were prepared in a facility not subject to inspection, and (4) local health departments are notified of the event (Health-General §21-304).

Conclusion

The Workgroup evaluated the current food safety landscape in Maryland and identified several opportunities for improvement. A concerted and cooperative effort by local health departments, the Maryland Department of Health, the General Assembly of Maryland, and the many businesses and organizations that host temporary food events can ensure temporary food events can continue to bring communities together in a safe, healthy way.

Appendix

I. Membership

The Workgroup comprised the following individuals:

Lisa Staley*	Maryland Department of Health
Eric King	Sea King Seafood / Pig Picker's BBQ Restaurant / Maryland Restaurant Association
Colby Ferguson	Maryland Farm Bureau
Sharon Pawlowski	Anne Arundel County Health Department
Kenneth Welch	Montgomery County Health and Human Services
Julie Mackert	Harford County Health Department
Cynthia Shruell	Wesley Freedom United Methodist Church
Dr. Clifford Mitchell*	Maryland Department of Health

*- *Lisa Staley served as the chair through September 7th and was replaced by Clifford Mitchell.*

The meetings of the Workgroup were open to the public and shared through the Maryland Register, on the Department's website, with local health departments, and with interested stakeholders.

II. Regulation of Food Prepared in Private Homes in Other States

Regulations from select states were reviewed for how food prepared in a private kitchen may be limited at temporary food events hosted by nonprofits and religious organizations.

Pennsylvania (Pennsylvania Code § 46.212. Food prepared in a private home)

A nonprofit, religious, or charitable organization may offer only non-potentially hazardous foods prepared in an unlicensed private home kitchen with proper notice to consumers. Food prepared in a private home may be donated to a nonprofit, religious, or charitable organization.

Virginia (Virginia Administrative Code 12VAC5-421-10. Definitions)

Virginia excludes from the definition of a "food establishment":

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 law and if the consumer is informed by a clearly visible placard at the sales or service location that the food is prepared in a kitchen that is not subject to regulation and inspection by the regulatory authority.

Virginia further exempts:

Churches, fraternal, school and social organizations and volunteer fire departments and rescue squads that hold dinners and bazaars not more than one time per week and not in excess of two days duration at which food prepared in homes of members or in the kitchen of the church or organization and is offered for sale to the public; [and]

Churches that serve meals for their members as a regular part of their religious observance.

Minnesota

Minnesota Statutes, Chapter 157.22 provides several exemptions, including:

(8) food not prepared at an establishment and brought in by individuals attending a potluck event for consumption at the potluck event. An organization sponsoring a potluck event under this clause may advertise the potluck event to the public through any means. Individuals who are not members of an organization sponsoring a potluck event under this clause may attend the potluck event and consume the food at the event. Licensed food establishments other than schools cannot be sponsors of potluck events. A school may sponsor and hold potluck events in areas of the school other than the school's kitchen, provided that the school's kitchen is not used in any manner for the potluck event. For purposes of this clause, "school" means a public school as defined in section 120A.05, subdivisions 9, 11, 13, and 17, or a nonpublic school, church, or religious organization at which a child is provided with instruction in compliance with sections 120A.22 and 120A.24. Potluck event food shall not be brought into a licensed food establishment kitchen;

(12) food served at fund-raisers or community events conducted in the building or on the grounds of a faith-based organization, provided that a certified food manager, or a volunteer trained in a food safety course, trains the food preparation workers in safe food handling practices. This exemption does not apply to faith-based organizations at the state agricultural society or county fairs or to faith-based organizations that choose to apply for a license;

(14) chili or soup served at a chili or soup cook-off fund-raiser conducted by a community-based nonprofit organization, provided:

- (i) the municipality where the event is located approves the event;*
- (ii) the sponsoring organization must develop food safety rules and ensure that participants follow these rules; and*
- (iii) if the food is not prepared in a kitchen that is licensed or inspected, a visible sign or placard must be posted that states: "These products are homemade and not subject to state inspection.*

Foods exempt under this clause must be labeled to accurately reflect the name and address of the person preparing the foods.

Massachusetts

In Massachusetts, potentially hazardous foods may be prepared in a private home and served at a nonprofit, but not for the purposes of fund-raising. Non-potentially hazardous foods prepared in a private kitchen may be sold at a bake sale.

Chapter 94, Section 328 states:

The preparation of food in private homes for donation to a nonprofit corporation for distribution or serving by such corporation without charge or at a charge sufficient to cover the cost of handling such food shall not be subject to licensure or regulation. The department of public health shall provide advisory guidelines and interpretations for the

safe and sanitary preparation of such food.

Under Code of Massachusetts Regulations 105 Section 590, “food establishments” are defined to exclude:

(c) A kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function such as a religious or charitable organization's bake sale;

(d) A kitchen in a private home that prepares food for distribution to a charitable facility in accordance with M.G.L c. 94, § 328;

The Code of Massachusetts Regulations also provides general requirements for residential kitchens (105 CMR § 590.009(D)(3)).

National Conference of State Legislatures

The National Conference of State Legislatures provided additional information on national trends in food safety regulations. Based on this information, the following observations can be made:

- The 2017 FDA Food Code defines a temporary food establishment as “a food establishment that operated for a period of no more than 14 consecutive days in conjunction with a single event or celebration.”