House
Legislative
Analysis
Section

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FOOD LAW OF 2000

House Bill 5196 (Substitute H-1)
First Analysis (2-17-00)

Sponsor: Rep. Ruth Johnson
Committee: Health Policy

THE APPARENT PROBLEM:

Food safety is of paramount importance. Each year, people are sickened, and many die, from food contaminated with food-borne pathogens such as *E. coli*, salmonella, and listeria. With a global economy, foods often cross borders between countries, not just states. To better protect people from food-borne illnesses, there has been a national move to adopt unified food laws that would establish uniformity in the way food is handled across the country.

In Michigan, a workgroup of 93 representatives of the Michigan Department of Agriculture, state and local public health agencies, the U.S. Food and Drug Administration, university researchers, and the food industry have met for the last two years to discuss ways to overhaul the state's regulation of food programs. The food laws have not been significantly rewritten in over 30 years, yet major changes have taken place in food establishments. People are eating more meals away from home than ever before, many grocery stores sell hot, ready-to-eat food like whole chickens, convenience stores sell nachos and hot dogs, and so forth. Increasingly, grocery stores have restaurants located inside the building. Added to this is that the types of food people eat today has also changed. Raw fish (sushi) is now highly desired, salad bars are found in restaurants and in grocery stores, sales of pre-cut fruits and vegetables are increasing. Scientific knowledge has advanced, and equipment design has improved. For example, it is now known that cold food needs to be kept colder and hot foods hotter than previously thought. Proper hand washing and the use of gloves when handling ready-to-eat foods can significantly decrease incidents of food contamination. Establishments that carry the greater risk of food contamination should be inspected more rigorously and frequently than ones dealing only in packaged foods.

In light of the many changes in food establishments, it has become increasingly clear that Michigan's food laws have not kept up. Many provisions need to be updated, and new provisions need to be written to address the changing climate in the food system. The food laws, spread out over 12 different state statutes and numerous departmental regulations, need to be consolidated. Conflicting language needs to be deleted, and many confusing passages need clarification. Most importantly, the system needs to be adjusted to eliminate duplication of licensing and inspection requirements for newer establishments that fall under the oversight of both a local health department and the Department of Agriculture, such as grocery stores with a food court. In order to update current laws to meet the present and future challenges of ensuring food safety, the workgroup has recommended the adoption of the Food and Drug Administration 1999 Food Code and a rewrite of the state's laws and regulations regulating the food system. Legislation has been proposed to incorporate the workgroup's recommendations into law.

THE CONTENT OF THE BILL:

Currently, food safety in the state is regulated by twelve different statutes and regulations. The bill would create the Food Law of 2000 to consolidate, update, and streamline the laws regulating food establishments. "Food establishment" is defined in the bill as an operation where food is processed, packed, canned, preserved, frozen, stored, prepared, served, sold, or offered for sale. Food establishment would include a food processing plant, a food service establishment, and a retail grocery store. The bill defines a "food processing plant" as an operation that processes, manufactures, packages, labels, or stores food but does not provide food directly to a consumer. "Food service establishment" and "retail grocery store" would retain their current definitions except that a bed and breakfast having eight (decreased from ten) or fewer sleeping rooms and a bed and breakfast having at least 9 (decreased from 11) sleeping rooms serving only a continental breakfast would not be considered to be a food service establishment. Further, bed and breakfasts meeting the above exemption would no longer be able to serve other meals (e.g., afternoon

tea) and requirements for all rooms to be equipped with smoke detectors and for the establishment to have a fire extinguisher on each floor would be eliminated. Among a great number of changes, the bill would make the following substantive changes:

Federal Food Code. The bill would adopt the federal Food and Drug Administration 1999 Food Code. The FDA 1999 Food Code would preempt or supercede numerous provisions currently contained in the various state statutes and departmental regulations regulating food safety. Under the bill, the Food Code would be modified to require that the oven temperature for high humidity oven temperature would have to be 130 degrees Fahrenheit or higher. The bill would also specify that the director of the MDA could adopt any changes or updates to the Food Code by departmental rule, and that the annexes of the Food Code would be considered a persuasive authority for interpretation of the Food Code.

Eliminate Duplicity of Inspections and Licenses. Grocery stores are licensed and inspected by the MDA, and restaurants by a local health department. Currently, some establishments (e.g., grocery stores that also contain restaurants) are required to be licensed by the MDA and by the local health department, as well as be subjected to inspections by both agencies. Instead, the bill would base the license category for any establishment on the predominant part of the food business.

Temporary and mobile licenses. Currently, there are seven licensing categories for mobile and temporary food service establishments. The bill would instead simplify the categories into four categories: mobile food establishments; temporary food establishments; special transitory food units (this new category would allow operation throughout the state year-round with a single license); and limited retail food establishments (for establishments in a fixed location and would include both retail food establishments and retail grocery stores). All four establishment categories would have to meet the same food safety requirements under the FDA 1999 Food Code. The bill would include licensing criteria for a special transitory food unit license.

Fixed licenses. Licenses for food establishments with fixed locations would be based in part on whether or not food service was offered and by the size of the establishment (e.g., under current provisions, a convenience store and a food processor such as Kellogg's would carry the same license) The categories would be as follows:

• A retail food establishment, which sells food directly to a consumer and includes retail grocery and food service establishments, but not food processing plants. A "retail grocery" is an operation that sells food to a consumer for off-premises consumption. "Off-premises consumption" does not include take-out food intended for immediate consumption.

• Extended retail food establishment, which serves or provides unpackaged foods for immediate consumption and provides customer seating in the food service area.

• Food processor, which is an operation processing, manufacturing, packaging, or labeling food and which provides the food other than directly to consumers.

• Mobile food establishment commissary, which is an operation capable of servicing a mobile catering food establishment.

• Food warehouse, which is a food establishment that stores or distributes prepackaged food other than directly to consumers.

The bill would add the following to the list of establishments that are exempt from licensure requirements: a produce stand offering only whole uncut fresh fruits and vegetables; and a retail food establishment that 1) only sells prepackaged, non-potentially-hazardous foods and 2), offers only an incidental amount of food, such as the sale of single-service packages (e.g., a card shop selling seasonal candy). The bill would also expand the exemption for temporary food establishments with no food preparation that use only single-service articles and serve only non-potentially-hazardous food or beverage to include grocery stores with packaged foods.

Licenses and fees. All licenses, except for temporary licenses which are valid for up to 14 days, would have to be renewed on April 30 of each year. License fees that are charged by the MDA for establishments directly inspected and regulated by the department would be changed as follows:

• Retail food establishment - $67.

• Expanded retail food establishment, food processor, and mobile food establishment - $172.

• Vending - $25.
• Temporary food establishment - $25.

• Special transitory food unit - $117 (a local health department would be required to impose the $117 fee on applicants).

In addition, the additional state license fees, which are service fees submitted to the department by the local health departments, would be updated to reflect inflationary increases. A vending machine location fee, mobile food service establishment, and temporary food service establishment fee would be increased to $2.50; a food service establishment fee to $19; and a mobile food establishment commissary fee would be set at $19 and a special transitory food unit fee at $30.

Education Funds. The bill would create two new revolving funds in the Department of Treasury. A consumer food safety education fund to provide statewide training and education to consumers on food safety would be funded by a $3 surcharge for each food establishment category (vending machines and fee-exempt food establishments would be exempted), and an industry food-safety education fund to provide statewide training and education on food safety to food service establishment employees and agents of the director of the MDA charged with enforcing the Food Law would be funded by a $2 surcharge on the above licensees. An advisory committee consisting of at least nine members representing consumers, industry, government, and academia would advise the MDA of the use of the funds. Money remaining in a fund at the end of a fiscal year would not revert to the general fund, but would remain in the fund.

Penalties. The bill would consolidate and unify the penalty sections of the various food laws into a single penalty section. Prohibited acts would remain virtually the same as current law. However, under the bill, it would also be unlawful to remove a tag, seal, or mark placed by the director of the MDA on a food that was unsafe for consumption; make a false statement, representation, or certification in any application, report, plan, or other required documentation; and fail to establish or maintain any record or make any report required under the bill or the federal Food, Drug, and Cosmetic Act, or refuse access to or verification or copying of any such required record (the latter parallels the federal standard for low-acid canning laws).

Other changes in the penalty clauses include the expansion of the department's authority to levy administrative fines to all categories of establishments. In addition, a defendant convicted of a violation could be assessed an amount to cover the department's costs to investigate the violation. The assessment for costs would have to be paid to the state treasury and credited to the MDA for the enforcement of the act. Further, the bill would increase the fine for a misdemeanor conviction to a minimum fine of $250 and maximum of $2,500, and increase the fine for a felony conviction to not more than $10,000 plus twice the amount of any economic benefit associated with the violation, or both. A felony charge would also include possible imprisonment for up to four years.

Bare-hands Contact. Under the FDA 1999 Food Code, food employees, except when washing fruits and vegetables or when otherwise approved, may not touch ready-to-eat foods with their bare hands, and are required to use suitable utensils such as spatulas and tongs. The bill, by way of clarification, would establish a procedure for establishments to follow in meeting the federal regulation's allowance for an "otherwise approved" practice for bare-hands contact of food. The procedure would include the establishment of a written alternative policy and procedure that met specified criteria.

Miscellaneous Provisions.

• The cold-holding temperature for certain meat products would be reduced from 50 degrees Fahrenheit to 41 degrees Fahrenheit, and the cold-holding temperature for food service establishments would be lowered from 45 degrees Fahrenheit to 41 degrees Fahrenheit.

• Currently, the MDA can issue a food establishment license with limitations for food service establishments. The bill would expand this provision to cover all establishments regulated under the bill.

• The bill would allow the MDA to require certain individuals to complete a manager food safety training for establishments with repeated failures to correct a critical violation and would establish provisions including the establishment of criteria for departmental approval of food safety training material.

• The bill would also adopt by reference several federal laws and regulations that regulate various aspects of the food industry, including the Good Manufacturing Practices standard for processing plants, federal bottled water requirements, the federal packaged food standards of identity, and federal requirements regarding the processing of acified and low-acid foods.

• The 1977 labeling requirements, which were adopted in 1986, would be updated and the new federal regulations would be adopted.

• The Association of Food and Drug Officials' recommendations regarding temporary permits for interstate shipment of experimental packs of food would be adopted.

• The bill contains an explanation of how to satisfy the requirements in the federal Food Code regarding consumption of animal foods that are raw, undercooked, or not otherwise processed to eliminate pathogens.

• The bill specifies that exhaust ventilation would be designed, constructed, and installed in compliance with applicable state law.

• The MDA would not be required to redelegate a food service sanitation program to a local health department that was discontinued or revoked for failure to meet program criteria.

• The name of the Food Service Sanitation Advisory Board would be changed to the Retail Food Advisory Board and the membership of the board would be clarified.

Repeals and Rescissions. The following acts and parts of acts would be repealed six months after the bill's effective date:

• Public Act 384 of 1913, the vinegar act, MCL 289.551-289.559.

• Public Act 228 of 1952, the Michigan comminuted meat law, MCL 289.581-289.592.

• Public Act 166 of 1957, regarding the false advertising of meat and meat products, MCL 289.261-289.268.

• Public Act 39 of 1968, the Michigan Food Law, MCL 289.701-289.727.

• Public Act 328 of 1978, the Food Processing Act, MCL 289.801-289.810.

• Sections of the Public Health Code, 333.12901-333.12904, 333.12905a-333.12908, 333.12910-333.12913, and 333.12916-333.12921. For six months after the effective date of the bill, establishments would have to comply with the standards in the provisions listed above for the design, construction, and equipment of food service establishments. Beginning six months after the bill's effective date, the standards of design, construction, and equipment established under the bill would apply.

The following rules would be rescinded six months after the bill's effective date: R 285.538, R285.549, R285.554, R 285.556, R 285.557, R 285.558, and R 325.25101-R 325.26008 of the Michigan Administrative Code. Further, beginning six months after the bill's effective date, R 285.553 of the Michigan Administrative Code would not apply to any food establishments under the bill except for farm crop storages that are exempt from the provisions of the bill.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill could result in additional state license fee revenue and could also result in additional state administrative costs to the Department of Agriculture. In a fiscal note dated 2-9-00, the agency reports that the department estimates that the new license fee schedule could increase revenues by about $760,000, from the current level of $900,000 to just under $1.7 million. The bill also authorizes the department to charge for new food safety-related services that it provides. The amount of revenue generated from the provision of these services will be contingent upon the demand for services. Revenue from these fees is earmarked for enforcement of the act.

The agency reports that the bill's provision to assess administrative fines up to $1,000 and the actual costs of an investigation for violations of the act could also increase departmental revenues. The bill increases the minimum and maximum penalties for misdemeanor and felony violations and also allows the department to assess the costs of the investigation against the violator. Revenue recouped from investigative costs is earmarked for enforcement of the act.

The bill also creates a new Food Safety Education Fund that will be administered by the department and funded by a $3 surcharge to each food establishment license. The fund will be used to provide statewide training and education to consumers on food safety, and the agency reports in its fiscal note that the surcharge would increase state revenues by $150,000 annually.

Finally, the House Fiscal Agency reports that the bill could result in additional state administrative costs to the Department of Agriculture. The agency estimates

that $1.2 million would be needed to implement and administer the bill, which would include the cost of an additional ten full-time employees. However, the agency estimates that $760,000 of these costs will be covered by the new fee revenue generated under the bill.

According to Department of Agriculture staff, the bill could result in an initial increase in costs for local health departments to train licensees about the required lower handling temperature for cold foods. However, the bill is not expected to result in any ongoing costs for implementation. (2-15-00)

ARGUMENTS:

For:

Anyone attempting to read through Michigan's food laws can quickly see why it is advantageous to consolidate them. Currently, the "food laws" are really 12 different sets of statutes and administrative regulations; the federal Food, Drug, and Cosmetic Act; and the federal Food Code. Trying to find all pertinent regulations for a specific type of establishment or specific function is a time-consuming and difficult task. The bill is an attempt to consolidate the various laws and to eliminate conflicting provisions. Many provisions are updated to reflect current standards and much confusing language is clarified for better understanding. In short, the bill would enable a person to go to one document to find most of the applicable standards and regulations. Though it does adopt some other laws by reference (the above two federal statutes are adopted by reference, as are several other federal laws and regulations and industry standards), the bill would provide a central document rather than the 12 different sets of state law as currently exists.

For:

Perhaps the single most significant aspect of the bill is that it eliminates the duplication of inspections and licensing that is occurring now. For example, restaurants are licensed and inspected by local health departments, and grocery stores by the Department of Agriculture. However, in today's changing marketplace, many grocery stores have restaurants within their establishments, such as food courts, and some restaurants sell packaged foods. Currently, these types of establishments may be licensed and inspected by both agencies. Besides being costly and inefficient, there are conflicts in the way the two agencies approach implementing the laws, and conflicts in some provisions of the laws. Therefore, a business owner may find himself or herself in compliance with one set of regulations, and in violation of others. The bill would rectify this situation.

For:

The bill allows the system for licensure to be restructured so that those establishments who, by the types of services offered, carry a greater risk of transmitting food-borne illness through contamination also carry higher license fees to support appropriate inspections. For example, a small convenience store that does not offer ready-to-eat foods like hot dogs, hot coffee, and so forth should not have to pay the same license fee or be subjected to the same number of inspections that a large restaurant or grocery store with a food court should have. The bill would allow the department and the local health department to maximize resources by focusing on those establishments that carry a greater potential risk for transmitting diseases through contaminated food.

For:

The bill consolidates and enhances the penalties available under current law. Minimum and maximum fines are increased for misdemeanor offenses, and a stiffer penalty is set in place for felony convictions. Perhaps the change that has the most potential for stemming violations of the food laws is the provision expanding the use of administrative fines and sanctions to all sectors of the food industry, not just those regulated under the Michigan Comminuted Meat Law (according to department staff, the institution of administrative sanctions resulted in a big decrease in violations). This will give the Department of Agriculture a broader range of enforcement tools, rather than having to bring criminal charges and go through the court system.

Response:

Though an administrative fine is preferable to a criminal charge, under the bill, each day an offense exists counts as a separate occurrence. This could be unfair to businesses who didn't know they were in violation of the laws, or who may have to wait days or weeks for a new piece of equipment to be delivered or for a repair person to complete repairs. Also, since inspections can be subjective in nature, a business could be unfairly penalized if there were a conflict between the licensee and an inspector. The bill should be amended to limit how many administrative sanctions could be levied in a year.

Rebuttal:

To adopt such a change would defeat the whole purpose of expanding the administrative fines to all

businesses. Most businesses are very willing to work towards compliance. Allowing broader use of administrative sanctions should improve the current system, not worsen it. If the department suspected a business of multiple violations over the course of a year, but was only allowed to levy one fine, the department would be forced to levy criminal charges. It would be a shame for a licensee to face a criminal record for having excess fat in the hamburger! Plus, going through the criminal justice system results in increased costs both to taxpayers and the licensees. Besides, the department would have some discretion in levying fines. If experience under the new law shows that licensees are being unfairly fined while waiting for parts to make necessary repairs, and so on, then the provisions can be adjusted at a future date. Above all else, it must be remembered that these laws are in place to reduce and eliminate illness and death caused by contaminated food. The public safety must be protected.

Against:

Under the 1999 FDA Food Code, which the bill would adopt by reference, restaurant and other food service employees who come into contact with ready-to-eat foods must wear gloves except "when otherwise approved." The bill, however, sets up a complicated and potentially burdensome approach for local health departments to follow in setting criteria to determine when restaurant workers may use bare hands to complete some tasks. This could result in policies differing widely across the state. A better approach would be to adopt policies on hand washing and proper hygiene that would be consistent across the state. If restaurants develop stringent hand washing policies for their staffs, they should be granted greater flexibility by the local health departments in deciding which tasks should be done gloved and which tasks could be done with bare hands.

Response:

According to the Department of Agriculture, about 80 percent of illnesses transmitted by contaminated food could have been prevented by the consistent and proper use of wearing gloves when preparing ready-to-eat foods. Food-borne illnesses can be very serious. In recent years, several food-borne illnesses have resulted in the deaths of many people and severe illnesses in others. Women can suffer miscarriage as a result of ingesting pathogens in food, hepatitis B can cause serious illness and premature death, and so on. Children and the elderly, as well as those with compromised immune systems, are most at risk. A single worker not washing his or her hands after using the bathroom, working when infected with a communicable disease, or working around food with an open cut on his or her hand can affect hundreds, and in the case of the tainted strawberries in Western Michigan a few years ago, thousands.

Some object to provisions that require establishments to submit documentation as to why they can't comply with wearing gloves in food preparation; to submit a written, alternative plan; to institute effective training programs for employees, and so forth. These provisions are not meant to be overly burdensome, but to require an establishment to give careful thought to an alternative plan. What may seem easy to implement in thought can be quite problematic in practice. When trying to think through implementation, it may become clear that bare-hand contact for certain tasks could result in a greater risk of transmission of food-borne illnesses.

Against:

As the bill is written, local health departments would lose the authority and enforcement powers to ensure that exhaust ventilation systems in restaurants are appropriate to the establishments and meet current industry regulations. Under departmental rules that will be rescinded by the bill, the Department of Agriculture is required to publish a description of ventilation systems and their specific uses, which the local health departments use in their inspections. The bill instead simply requires that exhaust ventilation systems be designed, constructed, and installed in compliance with applicable state law. Representatives of local health departments say that this would place inspection and oversight of ventilation systems under the responsibility of the Department of Consumer and Industry Services, which lacks the resources to provide the same level of inspection services that the local health departments are currently providing. Though the FDA Code, which would be adopted by reference, does touch on ventilation systems, it is vague and could cause implementation problems. An easy solution would be to remove the language rescinding R 325.26001, or to incorporate the language within the rule into the bill.

POSITIONS:

The Department of Agriculture supports the bill. (2-10-00)

Spartan Stores supports the bill. (2-15-00)

The Michigan Grocers Association supports the bill. (2-15-00)

The Michigan Retailers Association supports the bill. (2-15-00)

The Associated Food Dealers of Michigan supports the bill. (2-16-00)

The Michigan Association for Local Public Health generally supports the bill, but is continuing in discussions on certain points. (2-15-00)

The Wayne County Health Department generally supports the bill, but still has a concern regarding ventilation systems. (2-16-00)

The Michigan Hotel, Motel, and Resort Association generally supports the bill, but has one remaining concern. (2-15-00)

K-Mart, Inc. is neutral on the bill. (2-15-00)

The Michigan Golf Course Owners Association is currently neutral on the bill, but would prefer more flexibility in standards for bare-hands contact. (2-15-00)

The Michigan Restaurant Association has no position at this time. (2-15-00)

Analyst: S. Stutzky

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.