

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF PUBLIC HEALTH

Statutory Authority: 16 Delaware Code, Section 122(3)u.1 (16 Del.C. §122(3)u.1)
16 DE Admin. Code 4458

FINAL

ORDER

4458 State of Delaware Food Code Regulations

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("DHSS") initiated proceedings to adopt the State of Delaware Food Code. The DHSS proceedings to adopt regulations were initiated pursuant to 29 Delaware Code Chapter 101 and authority as prescribed by 16 Delaware Code §122(3)(u)(1).

On December 1, 2019 (Volume 23, Issue 6), DHSS published in the *Delaware Register of Regulations* its notice of proposed regulations, pursuant to 29 *Del.C.* § 10115. It requested that written materials and suggestions from the public concerning the proposed regulations be delivered to DHSS by January 31, 2020, after which time DHSS would review information, factual evidence and public comment to the said proposed regulations.

Written comments were received during the public comment period and evaluated. The results of that evaluation are summarized in the accompanying "Summary of Evidence."

FINDINGS OF FACT:

Non-substantive changes were made to the proposed regulations. The Department finds that the proposed regulations, as set forth in the attached copy should be adopted in the best interest of the general public of the State of Delaware.

THEREFORE, IT IS ORDERED, that the proposed State of Delaware Food Code is adopted and shall become effective August 11, 2020 (ten days), after publication of the final regulation in the *Delaware Register of Regulations*.

July 14, 2020

Date of Signature

Kara Odom Walker, MD, MPH, MSHS
SECRETARY

SUMMARY OF EVIDENCE

STATE OF DELAWARE FOOD CODE

In accordance with Delaware Law, public notices regarding proposed Department of Health and Social Services (DHSS) State of Delaware Food Code Regulations were published in the *Delaware Register of Regulations*. Written comments were received on the proposed regulations during the public comment period (December 1, 2019 through January 31, 2020).

Entities offering written comments include:

- Walter Dodson Jr.
- Connie Groll
- Janice
- Mars, Incorporated - Michael Mayers, Director, Public Affairs & Government Relations
- Linda McLaughlin
- Eleanor Oudshoorn
- Rich Parfitt
- Jacqueline Rifenbergh
- Taylor
- Anonymous, Lewes Resident
- Stanley C. Dillon
- Yum! Brands, Inc - Jessica Zetlau, Food Safety & Regulatory Affairs

Comments

Walter Dodson Jr.

<https://www.msn.com/en-ie/news/world/healthy-man-dies-after-being-licked-by-dog-and-getting-rare-infection-researchers-found/ar-BBxkks>

- **Response:** The Department appreciates and acknowledges this comment. State law dictates the owner of a food establishment or beer garden may permit leashed dogs in the owner's beer garden or on the owner's licensed outdoor patio and therefore, no changes will be made.

Connie Groll

I wish to voice my opinion about the proposal for dogs on restaurant decks & patios. I have been a dog owner for 35 years. I am completely in support of pets owned by people for emotional support. They provide unconditional companionship for their owners, which in turn gives good care for themselves.

However, I do not think that dogs belong on any restaurant grounds. I cannot control my pet's needs such as defecating or barking when he chooses to do either. As well trained as any dog can be, this is impossible for anyone to assume or anticipate this occurrence.

Both are health risks & annoyances. I really wouldn't want my dog, or any dog to poop around my table while eating. That's really disgusting as well as rude. I would probably leave the restaurant if that happened around my table while eating.

My husband & I enjoy eating outdoors very much. We usually pick a table on decks if available.

I am personally allergic to very furry dogs. What about people like myself? That's a health risk in itself in case of severe reaction to animal danders. I have allergic asthma & I would be avoiding a table outside to eat, if I saw a large dog on the deck. Working in the medical field, especially in allergy treatment, has showed me that allergic reactions can be severe and life-threatening. Large dogs (like Labs) are often dirty or have an odor that I can detect & dislike. That would surely kill my appetite for eating!

Also, what about the "other" support pets that owners will then attempt to bring into restaurants? There opens another situation that the laws will need to deal with soon, I think. Dogs are popular, but owners will claim that their pets are cleaner, smarter, or more portable than active dogs.

Thank you for allowing me to voice my opinion. As much as I'd like to take my dog with me to lunch, it's not where he belongs. I actually took him to Irish Eyes outdoor bar area last year. He was scared & wanted to leave since customers were constantly trying to pet him. After a while, he was exhausted & he was frightened. I decided that this was no place for animals. Do restaurant workers pet these animals? That's so unhealthy, too!

I hope we resolve this issue soon & create a safe, clean environment for people to eat.

- **Response:** The Department appreciates and acknowledges this comment. State law dictates the owner of a food establishment or beer garden may permit leashed dogs in the owner's beer garden or on the owner's licensed outdoor patio and therefore, no changes will be made.

Janice

We do not think dogs, unless a working service dog, should be allowed on any part of a restaurant's property. People try to treat them like they're a HUMAN part of their family, which they are not. They are animals. If they want them to be together while eating, do it at home. I like dogs but they should not be allowed in or on outside patios of a public eating establishment. It may offend non-dog lovers which could result in loss of business. Please vote this Down.

- **Response:** The Department appreciates and acknowledges this comment. State law dictates the owner of a food establishment or beer garden may permit leashed dogs in the owner's beer garden or on the owner's licensed outdoor patio and therefore, no changes will be made.

Mars, Incorporated - Michael Mayers, Director, Public Affairs & Government Relations

I am writing on behalf of Mars Petcare to provide our strong support for the Department of Health's proposed change to 16 DE Admin. Code 4458, amending Subpart 6-501.115 (B) to allow dogs in outdoor dining areas. Mars is proud to support this effort, as we believe that pets provide significant benefits to the communities they live in.

As you may know, Mars Petcare is the world's largest pet care company, whose leading brands include PEDIGREE®, WHISKAS®, ROYAL CANIN®, NUTRO™, GREENIES™, SHEBA®, CESAR®, IAMS™ and EUKANUBA™ as well as The WALTHAM™ Centre for Pet Nutrition which has advanced research in the nutrition and health of pets for over 50 years. Mars Petcare is also a leading veterinary health provider through a network of over 2,000 pet hospitals including BANFIELD®, BLUEPEARL™, PET PARTNERS™, VCA®, Linnaeus and AniCura. Mars currently employs over 260 Associates in Delaware, at 8 BANFIELD®, VCA®, and BLUEPEARL® pet hospitals.

We believe pets make the world a better place for people - and not only because they are our closest companions and confidants. Through our Waltham Centre for Pet Nutrition, we have conducted numerous studies into the human-animal relationship and found that pets reduce the risk of heart disease, help people better manage stress, promote healthy, active lifestyles, and help facilitate emotional connections between people. Given all the benefits pets bring to our lives, we launched the BETTER CITIES FOR PETS™ program, a comprehensive advocacy and education program which includes helping pets find permanent loving homes, improving shelter outcomes, and creating more pet-friendly spaces to encourage the bond between humans and pets. Allowing food establishments to create greater opportunities for people to bond with their pets and interact with other pet owners is not only a positive outcome for pets and pet owners - it also drives economic benefits for businesses! States across the country are recognizing the value of allowing pets in outdoor dining areas. In recent years, California, Ohio, Kentucky, New York, Tennessee, and Texas have enacted similar laws.

As pet lovers and as a pet business whose purpose is making A BETTER WORLD FOR PETS™, we applaud your efforts in proposing rulemaking to allow dogs in outdoor dining areas. Please do not hesitate to call on me at the numbers

listed below if I can provide any additional information or perspective on this proposal, or any other pet-related measures.

- **Response:** The Department appreciates and acknowledges this comment. State law dictates the owner of a food establishment or beer garden may permit leashed dogs in the owner's beer garden or on the owner's licensed outdoor patio and therefore, no changes will be made.

Linda McLaughlin

The owners of outdoor restaurants should have the choice of allowing dogs in designated areas. If the restaurant has an outdoor area, a well behaved, leashed dog should not cause any issues. If you don't like dogs, or have an allergy to dogs, you should eat inside or find another restaurant of your choice. Many families include their dogs in their family vacation. Restaurants that allow dogs in tourist areas are a welcome sight for these families. Most dogs that I have encountered in outdoor restaurants actually behave better than a lot of children.

The clear-cut bill proposed by Pete Schwartzkopf is the answer.

- **Response:** The Department appreciates and acknowledges this comment. State law dictates the owner of a food establishment or beer garden may permit leashed dogs in the owner's beer garden or on the owner's licensed outdoor patio and therefore, no changes will be made.

Eleanor Oudshoorn

I would prefer that dogs or other pets not be allowed in outdoor eateries unless separate servers are designated for the areas where dogs will be and where non-pet areas will be designated.

Even in outdoor areas, dog dander can be problematic.

Please consider all residents - not just dog owners.

- **Response:** The Department appreciates and acknowledges this comment. State law dictates the owner of a food establishment or beer garden may permit leashed dogs in the owner's beer garden or on the owner's licensed outdoor patio and therefore, no changes will be made.

Rich Parfitt

Although I was not able to find the draft proposed regulations online, I would like to comment on the proposal as I understand it from December 16 Cape Gazette article by Melissa Steele.

I thank the DHP for re-evaluating its position from last summer and now supporting dogs eating in outdoor area of restaurants, as has been the practice in many restaurants for several years.

People who for whatever reason object to the revised regulations still have the freedom to patronize dog friendly establishments through indoor eating. Likewise, they can patronize restaurants that are elect to not support outdoor dining with dogs.

But I think it's important to continue to allow people with dogs to patronize restaurants that choose to be dog friendly. People like myself sorely missed this perk when restaurants became frightened and changed their dog friendly policy last summer.

This new position of DHP now formalizes a long-standing practice that was enjoyed by many. Again I thank the DHP for their updated position.

- **Response:** The Department appreciates and acknowledges this comment. State law dictates the owner of a food establishment or beer garden may permit leashed dogs in the owner's beer garden or on the owner's licensed outdoor patio and therefore, no changes will be made.

Jacqueline Rifenberg

Enclosed please find an article about the dangers of retractable leashes. This is really pertinent to the issue of dogs at restaurants. Many people use retractable leashes, which do not allow for control of their dog.

My suggestion that dogs at outdoor eateries must be on a 4-foot or 6-foot leather or fabric leash (no chair or retractable leashes).

As the mom of five dogs, I enjoy having my dogs with me when possible. I hope a solution to the issue can be found.

- **Response:** The Department appreciates and acknowledges this comment. State law dictates the owner of a food establishment or beer garden may permit leashed dogs in the owner's beer garden or on the owner's licensed outdoor patio and therefore, no changes will be made.

Taylor

My complaint is in crowded areas the large dogs are on a leash but then they sprawl and lay down in the limited access between tables. They create a danger for servers and patrons trying to walk around. Maybe rule like on airplanes....dog must not be in aisle and remain under table or chair.

- **Response:** The Department appreciates and acknowledges this comment. State law dictates the owner of a food establishment or beer garden may permit leashed dogs in the owner's beer garden or on the owner's licensed outdoor patio and therefore, no changes will be made.

Anonymous, Lewes Resident (voicemail)

Summary of voicemail: Against proposed dog rule; allergic to dogs (dander and dog fur) and will not eat at restaurants that allow dogs; thinks it is unhealthy.

- **Response:** The Department appreciates and acknowledges this comment. State law dictates the owner of a food establishment or beer garden may permit leashed dogs in the owner's beer garden or on the owner's licensed outdoor patio and therefore, no changes will be made.

Stanley C. Dillon

I am writing to express my opposition to House Bill 275 that would allow dogs in outdoor spaces of restaurants.

I think it is unsanitary and dangerous, especially if small children are present.

I have been at restaurants in Florida that allowed dogs on their patio and the dogs have jumped on our table as well as others. The dogs also pushed young children down. I have also seen "well-behaved and well-trained" dogs misbehave on sidewalks and the boardwalk in Rehoboth.

I could write several more examples of experiences that I have had, but just want the Legislature to know there are people who are against this ridiculous bill.

- **Response:** The Department appreciates and acknowledges this comment. State law dictates the owner of a food establishment or beer garden may permit leashed dogs in the owner's beer garden or on the owner's licensed outdoor patio and therefore, no changes will be made.

Yum! Brands, Inc - Jessica Zetlau, Food Safety & Regulatory Affairs

I am writing on behalf of Yum! Brands, Inc., in regards to the proposed revisions to the 2020 Delaware Food Code. Yum! Brands has around 20,000 restaurant locations in the United States with approximately 35 restaurant locations in Delaware, the majority of which are owned and operated by local franchisees.

Yum! Brands is in support of Delaware repealing the current State of Delaware Food Code regulations and replacing in their entirety with the US FDAs 2017 Food Code to enforce food safety standards at retail food establishments such as restaurants like ours.

However, Yum! Brands does not agree with several proposed amendments to the code, including: (1) requiring operations that are ordered to cease and desist due to an imminent health hazard to remain closed for at least 24 hours; and (2) disallowing ill food employees from returning to work until 48 hours after being asymptomatic from an undiagnosed disease that resulted in vomiting and/or diarrhea.

(1) Requiring operations to be closed for at least 24 hours due to an imminent health hazard, such as an extended interruption of power or water, sewage backup or other restaurant emergency may not be warranted or necessary especially if the hazard and risk has been immediately identified and adequately managed by the restaurant. This requirement may also cause restaurants to not report or disclose imminent health hazards to the regulatory authority in fear that the restaurant may be closed for an extended period of time even if the hazard has been properly resolved within a few hours. Additionally, restaurants may lose business due to lengthy, unnecessary closures.

Yum! Brands recommends that this proposed amendment and specific wording regarding 24 hour closure be removed; if not, then Yum! Brands recommends allowing for flexibility in this proposed amendment with suggested or similar verbiage to ". . . remain closed up to 24 hours."

- **Response:** The Department appreciates and acknowledges this comment. This citation is in line with program needs/priorities and the protection of the public. It has been found that preemptive opening of an establishment that has been closed due to an imminent health hazard leaves risks in place and therefore additional program resources to conduct follow-up inspections. No changes will be made.

(2) Requiring ill food employees to remain off the work schedule for 48 hours after being asymptomatic deviates from the US FDA 2017 Food Code and current FDA recommendations. The recent 2017 publication in partnership with FDA and CDC titled, Quantitative Risk Assessment of Norovirus Transmission in Food Establishments: Evaluating the Impact of Intervention Strategies and Food Employee Behavior on the Risk Associated with Norovirus in Foods, concluded that the most important factors in reducing Norovirus transmission were removing ill team members from work and utilizing a combination of prevention strategies, including effective hand washing, implementation of glove use, no bare hand contact with ready-to-eat foods, and adequate cleaning and sanitizing of surfaces (food contact, restrooms, etc.). The authors of the risk assessment also concluded that an increase in the exclusion period from 24 to 48 hours only leads to a relatively small decrease in the estimated number of infected customers when compared with other prevention strategies (mentioned above), and may lead to an increase in infections and illness if compliance with the exclusion is not adhered to or reduced.

Ultimately, the FDA found that the results of the risk assessment did not warrant amending this section of the US Model Food Code from 24 hours to 48 hours. Yum! Brands recommends that this wording remain consistent at 24 hours with the US 2017 FDA Food Code.

- **Response:** The Department appreciates and acknowledges this comment. The Delaware Food Code requires removing ill food employees from work and utilizing a combination of prevention strategies, including effective hand washing, implementation of glove use, no bare hand contact with ready-to-eat (RTE) foods, and adequate cleaning and sanitizing of surfaces.

The additional 24-hour time (total of 48 hours post-symptoms) period for exclusion of food employees suffering from an undiagnosed gastrointestinal illness accounts for the fact that the U.S. Centers for Disease Control and Prevention estimates that norovirus is the leading cause of foodborne illness in the United States.¹ Transmission of norovirus has been shown to occur most commonly through the fecal-oral route, with contaminated food identified as a common vehicle of transmission. Exclusion of food employees exhibiting or reporting diarrhea symptoms is an essential intervention in controlling the transmission of norovirus from infected food employees' hands to RTE food items.

Norovirus also has a high secondary attack rate (> 50%) via person-to-person contact. Norovirus has also been reported to cause infection by airborne transmission when individuals are in close physical proximity to an infected individual vomiting in the facility. Therefore, an infected individual vomiting in a food facility increases the risk of infecting employees and consumers. Foodborne illness outbreaks have occurred from consumers vomiting in the dining room, or employees vomiting on the premises. Removing food employees exhibiting or reporting vomiting symptoms from the food facility protects consumers and fellow employees from infection with norovirus. Incubation Period: Generally, between 24 and 48 hours (median in outbreaks 33 to 36 hours), but cases can occur within 12 hours of exposure.

Capece and Gignac note that many cases of norovirus go undiagnosed, as many patients do not seek medical attention for treatment.² The Delaware Food Code requires excluding a food employee that has been diagnosed with norovirus to be excluded for 48 hours after symptoms subside.³ Knowing that the leading cause of food borne illness is norovirus and that many cases go undiagnosed, the Department realizes that undiagnosed gastrointestinal illness may likely be norovirus and therefore, shall be excluded for 48 hours after symptoms subside. No changes will be made.

¹ - Estimates of Foodborne Illness in the United States. Available from: <https://www.cdc.gov/foodborneburden/questions-and-answers.html>

² - Capece G, Gignac E. Norovirus. [Updated 2019 Feb 28]. In: StatPearls [Internet]. Treasure Island (FL): StatPearls Publishing; 2020 Jan-. Available from: <https://www.ncbi.nlm.nih.gov/books/NBK513265/>

³ - Delaware Department of Health and Social Services, Regulation A to Z. Available from: <https://www.dhss.delaware.gov/dhss/dph/regs.html#F>

Adoption of the 2017 Model FDA Food Code in its entirety without modifications and amendments allows restaurant companies that operate nationally, including Yum! Brands, to universally adopt food safety standards based upon the most recent food code without making significant document and process changes to comply with state specific regulations. Delaware specific modifications will cost restaurants and franchisees money in regards to compliance and the creation of Delaware specific documents (such as Employee Health Procedures posters) and leads to confusion on food safety standards.

4458 State of Delaware Food Code Regulations

4.0 State of Delaware Food Code

~~Name. These Regulations shall hereby be known as the “State of Delaware Food Code”.~~

~~Effective Date. The State of Delaware Food Code shall be effective May 11, 2014.~~

~~Prior Regulations Repealed. All current or previous regulations or parts of regulations in conflict with this State of Delaware Food Code are hereby repealed.~~

~~Location. A copy of the complete State of Delaware Food Code is available for public view at the following locations:~~

~~Jesse S. Cooper Building, 417 Federal St, Dover DE 19901~~

~~Severability. Should any part, sub-part, section, paragraph, sentence or phrase of this State of Delaware Food Code be declared unconstitutional or invalid by any competent authority, the remainder of this Code shall not be affected in anyway.~~

2.0 Adoption of United States Public Health Service 2013 Food Code

2.1 The State of Delaware Food Code adopts, as if fully set forth herein, the “United States Public Health Service 2013 Food Code” excluding Annex 1 through Annex 7, as amended herein:

2.1.1 Amend ~~Subpart 1-101.10~~ by inserting the words “State of Delaware” before the words “Food Code” and after the words “as the”.

2.1.2 Amend ~~Subpart 1-102.10~~ by deleting the subpart in its entirety and by inserting in lieu thereof the following, “The purpose of this Code is to safeguard public health, reduce the risk of foodborne illness and provide to consumers food that is safe, unadulterated and honestly presented. The purpose is also to regulate, within the State of Delaware, the production, transportation, storage, processing, handling, preparation and consumer service of human food; the inspections of food establishments; the issuing and revocation of permits to food establishments; and the application of compliance and enforcement procedures.

2.1.3 Subpart 1-201.10(B) Terms Defined

2.1.3.1 Amend Subpart 1-201.10(B) by adding thereto a new defined term after the defined term "Prior Foundation Item" and before the defined term "Public water system" to read as follows: "Private" means a use or function that is intended for a particular individual or group, such as a celebration of a birthday, wedding, anniversary or funeral, and that is not intended for consumers as members of the general public.

2.1.3.2 Amend Subpart 1-201.10(B) by deleting the definition for "Regulatory authority" and inserting in lieu thereof the following: "**Regulatory authority**" means the Secretary, Delaware Health and Social Services, or his/her authorized representative.

2.1.4 Amend Chapter 8 by adding thereto a new part "8-6" to read as follows:

8-6 Enforcement Procedures

8-601 Re-inspection Fee

8-601.10 Fee Assessment and Failure to Pay

(A) A re-inspection fee shall be assessed under one or more of the following circumstances:

- (1) Priority (P) or Priority Foundation (Pf) violations are shown to exist during a follow-up inspection.
- (2) Core (c) violations are shown to exist on successive routine inspections.
- (3) A complaint inspection requires a follow-up inspection to confirm compliance.
- (4) An inspection is required to determine compliance with the terms of a corrective action plan or an administrative hearing.
- (5) An inspection to determine the proper posting of a valid permit.
- (6) Any other follow-up inspection deemed necessary by the Regulatory Authority to determine compliance with this Code.

(B) The fee shall be that required by Chapter 1, Section 134 of Title 16 of the Delaware Code.

(C) Failure to pay the re-inspection fee, as specified, shall result in the automatic suspension of the permit to operate a food establishment. The permit shall remain suspended until the Regulatory Authority receives full payment of all fees.

8-602 Administrative Action

8-602.10 General

If the Regulatory Authority determines that a food establishment is operating without a valid permit; that one or more conditions exist which represent an Imminent Health Hazard; or that serious violations, repeat violations, or general unsanitary conditions are found to exist, administrative action may occur. Administrative action will be conducted in accordance with the law.

(A) Operation without a Permit

- (1) Immediate Closure Order. If a food establishment is found operating without a valid permit as required by subpart 8-301.11 of this Code, the Regulatory Authority shall order the facility immediately closed.
- (2) Notice of Closure. The closure shall be effective upon receipt of a written notice by the person in charge of the food establishment or an employee of the food establishment. A closure notice statement recorded on the inspection report by the representative of the Regulatory Authority constitutes a written notice.
- (3) Duration of Closure. The food establishment shall remain closed until a permit application, applicable fees and any required plans have been received and approved by the Regulatory Authority.

(B) Imminent Health Hazard(s)

- (1) Permit Suspension without Hearing. If some condition is determined to exist in a food establishment which presents an imminent health hazard to the public, the Regulatory Authority may suspend the operating permit of the food establishment without a prior hearing. The suspension shall be effective upon receipt of written notice by the person in charge of the food establishment or an employee of the food establishment. A suspension statement recorded on the inspection report by the Regulatory Authority constitutes a written notice.
- (2) A permit issued pursuant to subpart (1) shall not be suspended for a period longer than ten (10) government business days without a hearing. Failure to hold a hearing within the ten (10) government business day period shall automatically terminate the suspension.

~~(3) Hearing Request. The permit holder of the food establishment may request, in writing, a hearing before the Regulatory Authority at any time during the period of suspension, for the purpose of demonstrating that the imminent health hazard(s) no longer exist. The request for hearing shall not stay the suspension.~~

~~(C) Serious Violations, Repeat Violations and General Unsanitary Conditions. When conditions exist in a food establishment that represent serious violations, repeat violations or general unsanitary conditions, the Regulatory Authority may initiate a corrective action plan or schedule a hearing.~~

~~8-603 Agency Emergency Actions~~

~~8-603.10 Examination of Food.~~

~~Food may be examined or sampled by the Regulatory Authority as often as necessary for enforcement of this Code.~~

~~8-603.20 Wholesome and Free from Spoilage.~~

~~All food shall be wholesome and free from spoilage. Food that is spoiled or unfit for human consumption shall not be kept on the premises. The established administrative procedures for the implementation and enforcement of the provisions of Chapter 33 of Title 16 of the Delaware Code, relating to the embargo of misbranded or adulterated food, and penalties shall be applicable to this subpart.~~

~~8-604 Penalties~~

~~8-604.10 Operation in Violation of Code.~~

~~Any person (or responsible officer of that person) who violates a provision of this Code, and any person (or responsible officer of that person) who is the holder of a permit or who otherwise operates a food establishment that does not comply with the requirements of this Code shall be subject to the provisions of Section 107 of Title 16 of the Delaware Code.~~

~~8-604.20 Refusal, Failure or Neglect to Comply with Order of the Regulatory Authority.~~

~~Any person (or responsible officer of that person) who violates a provision of this Code, and any person (or responsible officer of that person) who is the holder of a permit or who otherwise operates a food establishment that refuses, fails or neglects to comply with an order of the Regulatory Authority shall be subject to an administrative penalty of not less than \$100 and not more than \$1,000, together with costs.~~

~~8-604.30 Injunction.~~

~~The Regulatory Authority may seek to enjoin violations of this Code.~~

~~8-604.40 Public Notification.~~

~~A placard, as provided by the Division, shall be prominently displayed at all entrances of food establishments that have failed to obtain a valid permit or have a permit that is suspended, revoked, or expired.~~

The following url's are provided for those that wish to obtain the Food Code.

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1.0 **State of Delaware Food Code**

Name. These Regulations shall hereby be known as the “State of Delaware Food Code”.

Effective Date. The State of Delaware Food Code shall be effective ~~[March XX August 11]~~, 2020.

Prior Regulations Repealed. All current or previous regulations or parts of regulations in conflict with this State of Delaware Food Code are hereby repealed.

Location. A copy of the proposed State of Delaware Food Code is available for public view at the following location: Office of Food Protection, Jesse Cooper Building, 417 Federal Street, Dover, DE 19901. The 2017 US FDA Food Code is available at: <https://www.fda.gov/food/fda-food-code/food-code-2017>.

Severability. Should any part, sub-part, section, paragraph, sentence or phrase of this State of Delaware Food Code be declared unconstitutional or invalid by any competent authority, the remainder of this Code shall not be affected in any way.

2.0 **Adoption of United States Public Health Service 2017 Food Code**

2.1 The State of Delaware Food Code adopts, as if fully set forth herein, the United States Public Health Service 2017 Food Code, available at <https://www.fda.gov/media/110822/download>, as amended herein:

2.1.1 Amend **Subpart 1-101.10** by inserting the words “State of Delaware” before the words “Food Code” and after the words “as the”.

2.1.2 Amend **Subpart 1-102.10** by deleting the subpart in its entirety and by inserting in lieu thereof the following: “The purpose of this Code is to safeguard public health, reduce the risk of foodborne illness and provide to consumers food that is safe, unadulterated and honestly presented. The purpose is also to regulate, within the State of Delaware, the production, transportation, storage, processing, handling, preparation and consumer service of human food; the inspections of food establishments; the issuing and revocation of permits to food establishments; and the application of compliance and enforcement procedures.”

2.1.3 Amend **Subpart 1-201.10(B) Terms Defined**

2.1.3.1 Amend Subpart **1-201.10(B)** by adding thereto-new defined terms:

“Alternative Food Establishment” means food establishments inclusive of alternative facilities to prepare food for public consumption. Specified under §8-305.

“Approval to Construct” or **“ATC”** means the record produced by the regulatory authority approving the construction of a food establishment in accordance with applicable laws and regulations.

“Caterer without a Premise” or **“CWOP”** means an alternative to traditional brick and mortar food establishments that results in a food establishment permit. This alternative operation is one whereby the permit holder conducts food establishment activities within another permit holder’s permitted food establishment and the foods are relinquished directly to the consumer. The utilities, physical facilities, food equipment, capacity and access must meet the needs of the CWOP operation and comply with the Food Code.

“Commissary” – See **“Servicing Area”**.

“Confirmed foodborne disease outbreak” means confirmed foodborne disease outbreak is defined as an incident in which two or more persons from separate households experience a similar illness after ingestion of a common food or meal and epidemiologic evaluation implicates the meal or food as the source of illness. Confirmed outbreaks may or may not be laboratory-confirmed.

“Conveniently located” means the ability to access the equipment and/or location without (A) risk of contamination; and (B) obstructions.

“Food Preparation” means a broad topic, involving all of the steps that occur between obtaining raw ingredients and consuming them as food.

“High Risk” means a food establishment that prepares food with multiple (3 or more) risk steps: handling, (combining-mixing), of raw ingredients; cooking; cooling; reheating; hot and cold holding for service; freezing and thawing; time as public health control and including:

- (1) Non-compliance on the same non-critical items on multiple inspections (3 or more) without correction, or
- (2) Non-compliance with the same CDC risk factors in two consecutive inspections no corrections; or

(3) Serves a highly susceptible population.

“Limited Frozen Dessert Stand” or **“LFDS”** means an alternative food establishment that dispenses Italian water ice, snow cones, bulk hard-pack ice cream or frozen yogurt; and other similar products. It does not include the sites at which these products are processed; facilities which mechanically dispense (soft-serve style machines) these products; nor, facilities which add toppings.

“Low Risk” means a food establishment that:

- (1) Prepares TCS Foods with only one or two of the following steps: cooking; cooling; reheating; hot and cold holding for service; low volume of foods; or
- (2) Is Medium Risk with Hazard Analysis Critical Control Point (HACCP) plan, or substantial compliance.

“Medium Risk” means a food establishment that:

- (1) Prepares TCS Foods with multiple (3 or more) risk steps: handling (combining-mixing) of raw ingredients; cooking; cooling; reheating; hot and cold holding for service; freezing and Thawing; Time as Public Health control; or
- (2) Is High Risk with HACCP plan or substantial compliance; or
- (3) Is Low Risk with non-compliance on multiple inspections (3 or more)

“Mobile Food Establishment” or **“MFE”** means a mobile food establishment is a vehicle mounted alternative food establishment that is readily moveable. MFEs require an agreement with a servicing area/commissary to ensure that the MFE in conjunction with the servicing area/commissary area meets the Food Code.

“Outdoor Spaces” means a porch, patio, deck or other structure with less than two contiguous walls that does not require travel through any indoor areas, including for entrance and exit.

“Peak Water Demand” is the quantity of water that the food establishment must have in order to meet all water needs in the food establishment.

“Peak Hot Water Demand” is the quantity of hot water that the food establishment must have in order to meet all hot water needs in the food establishment.

[“Private” means a use or function that is intended for a particular individual or group, such as a celebration of a birthday, wedding, anniversary or funeral, and that is not intended for consumers as members of the general public.]

“Probable foodborne disease outbreak” means a probable foodborne disease outbreak is defined as an incident in which two or more persons from separate households experience a similar illness after ingestion of a common food or meal, and a specific food or meal is suspected, but person-to-person transmission or other exposures cannot be ruled out.

“Request for Information” or **“RFI”** means a record produced by the regulatory authority requesting information related to the application for a permit to operate a food establishment in accordance with applicable laws and regulations.

“Very Low Risk” means a food establishment that:

- (1) Serves food to the public on 52 occasions or less per year and does not serve a highly susceptible population; or
- (2) Serves no Time/Temperature Control for Safety (TCS) foods and does not serve a highly susceptible population.

2.1.3.2 Amend **Subpart 1-201.10(B)** by amending defined terms:

Amend **“Food Establishment”** by adding thereto after (1)(b) the following: “(c) meets the physical facilities requirements of this Code.”

Amend **“Food Establishment”** by deleting the words “that are not TIME/TEMPERATURE CONTROL FOR SAFETY FOODS”.

Amend **“Food Establishment”** by adding thereto after (3)(g) the following: “(h) A private catered event.” and “(i) A Cottage Food Establishment.”

Amend **“Food Processing Plant”** by deleting the existing text after (1) “Food processing plant” and by inserting in lieu thereof the following: “means a type of food service establishment that is a commercial operation that processes food for human consumption, and provides processed food for sale and distribution to other business entities such as other food establishments.”

Amend **“Person in Charge”** by deleting the existing definition and replacing it to read as follows: “means the individual present at a food establishment who is responsible for the operation during all hours of food operations.”

Amend “Public Water System” to read as follows: “has the meaning stated in 40 CFR 141 National Primary Drinking Water Regulations and is also applicable to those private wells designated by the Division of Public Health as a Miscellaneous Public Well.”

Amend “Regulatory authority” by deleting the existing definition and replacing it to read as follows: “means the Secretary, Delaware Department of Health and Social Services, or his/her authorized representative.”

Amend “Service Animal” by deleting the existing definition and replacing it to read as follows: “as defined under 28 CFR §35.136 and by the Americans with Disabilities Act.”

Amend “Servicing Area” by adding the following after the last sentence: “The servicing area must be within our jurisdiction and reviewed during risk-based inspections. The servicing area must complement any caterer or mobile food establishment to allow the establishment to meet the physical facilities requirements of this Code.”

Amend “Temporary Food Establishment” by deleting the existing definition and replacing it to read as follows: “or “TFE” means an alternative food establishment that results in a TFE permit and prepares food for the public, free or for a cost. Events sanctioned to operate by a local or state jurisdiction may operate for up to fourteen (14) consecutive days in conjunction with that single event or celebration. All other non-sanctioned vendors may operate, with each day counting as one event. Vendors are limited to fourteen (14) event permits per calendar year.”

2.2 Amend **Subpart 2-201.13** to revise paragraph (A)(1)(a) by deleting the phrase “24 hours” and replacing it with the words “48 hours”.

2.3 Amend **Subpart 2-401.11(A)** by adding thereto after the words “any form of tobacco” the following: “and/or devices that people use to inhale an aerosol”.

2.4 Amend **Subpart 3-305.12(I)** by deleting the existing text and by inserting in lieu thereof the following: “Under or in contact with sources of contamination.”

2.5 Amend **Part 3-305** by adding thereto a new **subpart 3-305.15** to read as follows:

“3-305.15 Food Preparation Sink.

(A) A dedicated food preparation sink shall be installed in the food establishment.

(B) This section does not apply to certain types of food establishments deemed by the regulatory authority to pose minimal risk in the absence of a dedicated food preparation sink, such as establishments with non-TCS foods or those with commissaries that provide prewashed and prepared foods.”

2.6 Amend **Subpart 3-602.11(B)(4)** by deleting the phrase “manufacturer, packer, or distributor” and replacing it with the words “location of food preparation and packaging”.

2.7 Amend **Subpart 4-205.10** by deleting the existing text and by inserting in lieu thereof the following:

(A) Food equipment that is certified or classified for sanitation by an American National Standards Institute (ANSI)-accredited certification program is deemed to comply with Parts 4-1 and 4-2 of this chapter; and

(B) Manufacturer’s specifications are required as documentation to support compliance with Parts 4-1 and 4-2 of this chapter.

2.8 Amend **Subpart 4-501.16(B)** by deleting the existing text and by inserting in lieu thereof the following: “If a WAREWASHING sink is used to wash wiping cloths the sink shall be cleaned as specified under §4-501.14 before and after each time it is used to wash wiping cloths.”

2.9 Amend **Subpart 5-104.12(E)** by adding thereto before the words “Piping, tubing, or hoses connected to an adjacent APPROVED source.” the following: “Safely connected and protected”.

2.10 Amend **Subpart 5-202.12(A)** by adding thereto before the words “A HANDWASHING SINK” the following: “With the exception of facilities at a TEMPORARY FOOD ESTABLISHMENT.”.

2.11 Amend **Subpart 5-203.11** by adding paragraph (D) to read as follows: “If approved, an ALTERNATIVE FOOD ESTABLISHMENT may use alternative handwashing equipment:

(1) Provided with clean, running and warm water; and

(2) Provided with a safe means to collect gray water.”

2.12 Amend **Subpart 6-101.11(B)** by deleting the phrase “covered with mats, removable platforms, duckboards, or other APPROVED materials that are” in subparagraph (1) and by deleting the existing text in subparagraph (2) and inserting in lieu thereof the following: “Protection from weather and windblown dust and debris shall be provided.”

2.13 Amend **Subpart 6-202.13(B)(1)** by adding thereto after the words “a food preparation” the following: “warewashing or food dispensing”.

2.14 Amend **Subpart 6-301.12** by deleting subparagraph (B) in its entirety.

- 2.15 Amend **Subpart 6-501.115(B)** by adding subparagraph (6) to read as follows: “Dogs in designated OUTDOOR SPACES that are not used for food storage or preparation, when a person controls the animal and if a health or safety hazard will not result from the presence or activities.”
- 2.16 Amend **Subpart 8-201.11(A)** by adding thereto after the words “FOOD ESTABLISHMENT” the following: “or ALTERNATIVE FOOD ESTABLISHMENT”.
- 2.17 Amend **Subpart 8-201.11(C)** by adding thereto after the words “remodeling of a FOOD ESTABLISHMENT,” the following: “change of ownership”.
- 2.18 Amend **Subpart 8-302.11** by deleting the existing text and by inserting in lieu thereof the following: “An applicant shall submit an application sufficiently in advance of date of planned opening to allow for review and approval. The REGULATORY AUTHORITY will communicate with the applicant with REQUEST FOR INFORMATION and APPROVAL TO CONSTRUCT records.”
- 2.19 Amend **Subpart 8-302.14(A)** by adding thereto before the words “telephone number,” the following: “email address.”; and by adding thereto before the word “signature” the following: “electronic or print”.
- 2.20 Amend **Subpart 8-302.14(D)** by adding thereto after the word “title,” the following: “mailing”; and by adding thereto before the words “and telephone number” the following: “email address.”.
- 2.21 Amend **Subpart 8-302.14** by deleting subparagraph (E) in its entirety.
- 2.22 Amend **8-304.10(A)** by deleting the phrase “a copy of” and replacing it with the words “access to”.

3.0 Miscellaneous Provisions for the Delaware Division of Public Health

- 3.1 Amend Chapter 8 by adding thereto a new subpart 8-305.10 to read as follows:

“8-305.10 Alternative Food Establishments

The regulatory authority may authorize alternative food establishments to operate, following plan review and given that specific requirements are met for each type.

(A) Requires a signed Servicing Area Agreement:

- (1) Caterer without A Premise;
- (2) Limited Frozen Dessert Stand; and
- (3) Mobile Food Establishment.

(B) May require a signed Servicing Area Agreement:

- (1) Temporary Food Establishment.”

- 3.2 Amend Chapter 8 by adding thereto a new subpart 8-305.11 to read as follows:

“8-305.11 Alternative Food Establishment Closed or Suspended Permit

Alternative Food Establishments that require a servicing area must cease operations if the servicing area’s permit is suspended or closed.”

- 3.3 Amend **Subpart 8-401.10(B)(2)** by deleting the existing text and by inserting in lieu thereof the following: “The food establishment is assigned a less frequent inspection schedule that is being uniformly applied throughout the jurisdiction. The REGULATORY AUTHORITY will assign a risk category that correlates with inspection frequency. The categories are: VERY LOW RISK, LOW RISK, MEDIUM RISK and HIGH RISK.”

- 3.4 Amend **Subpart 8-404.11(A)** by deleting the words “an apparent foodborne illness outbreak” and by inserting in lieu thereof the following: “a PROBABLE or CONFIRMED FOODBORNE DISEASE OUTBREAK”.

- 3.5 Amend Chapter 8 by adding thereto a new Part 8-6 to read as follows:

“8-6 Enforcement Procedures

8-601 Re-inspection Fee

8-601.10 Fee Assessment and Failure to Pay

- (A) A re-inspection fee shall be assessed when an inspection is required beyond the routine schedule set for the risk category of the food establishment.
- (B) The re-inspection fee, required by Chapter 1, Section 134 of Title 16 of the Delaware Code, shall be paid upon or prior to inspection, in the following manner:
 - (1) The sum of \$50 shall be required for a second inspection.
 - (2) The sum of \$100 shall be required for a third inspection.
 - (3) The sum of \$150 shall be required for each subsequent inspection.
- (C) Failure to pay the re-inspection fee, as specified, shall result in the automatic suspension of the permit to operate a food establishment. The permit shall remain suspended until the Regulatory Authority receives full payment of all fees.

8-602 Administrative Action

8-602.10 General

If the Regulatory Authority determines that a food establishment is operating without a valid permit; that one or more conditions exist which represent an Imminent Health Hazard; or that serious violations, repeat violations, or general unsanitary conditions are found to exist, administrative action may occur. Administrative action will be conducted in accordance with the law.

(A) Operation without a Permit

(1) Immediate Closure Order. If a food establishment is found operating without a valid permit as required by subpart 8-301.11 of this Code, the Regulatory Authority shall order the facility immediately closed.

(2) Notice of Closure. The closure shall be effective upon receipt of a written notice by the person in charge of the food establishment or an employee of the food establishment. A closure notice statement recorded on the inspection report by the representative of the Regulatory Authority constitutes a written notice.

(3) Duration of Closure. The food establishment shall remain closed until a permit application; applicable fees and any required plans have been received and approved by the Regulatory Authority.

(B) Imminent Health Hazard(s)

(1) Permit Suspension without Hearing. If some condition is determined to exist in a food establishment, which presents an imminent health hazard to the public, the Regulatory Authority may suspend the operating permit of the food establishment without a prior hearing. The suspension shall be effective upon receipt of written notice by the person in charge of the food establishment or an employee of the food establishment. A suspension statement recorded on the inspection report by the Regulatory Authority constitutes a written notice.

(2) A permit issued pursuant to subpart (1) shall not be suspended for a period longer than ten (10) government business days without a hearing. Failure to hold a hearing within the ten (10) government business day period shall automatically terminate the suspension.

(3) Hearing Request. The permit holder of the food establishment may request, in writing, a hearing before the Regulatory Authority at any time during the period of suspension, for demonstrating that the imminent health hazard(s) no longer exist. The request for hearing shall not stay the suspension.

(4) Discontinued operation for the mitigation of an imminent health hazard requires a food establishment to remain closed for at least twenty-four (24) hours.

(C) Serious Violations, Repeat Violations and General Unsanitary Conditions. When conditions exist in a food establishment that represent serious violations, repeat violations or general unsanitary conditions, the Regulatory Authority may initiate a corrective action plan or schedule a hearing.

8-603 Agency Emergency Actions

8-603.10 Examination of Food.

Food may be examined or sampled by the Regulatory Authority as often as necessary for enforcement of this Code.

8-603.20 Wholesome and Free from Spoilage.

All food shall be wholesome and free from spoilage. Food that is spoiled or unfit for human consumption shall not be kept on the premises. The established administrative procedures for the implementation and enforcement of the provisions of Chapter 33 of Title 16 of the Delaware Code, relating to the embargo of misbranded or adulterated food, and penalties shall be applicable to this subpart.

8-604 Penalties

8-604.10 Operation in Violation of Code.

Any person (or responsible officer of that person) who violates a provision of this Code, and any person (or responsible officer of that person) who is the holder of a permit or who otherwise operates a food establishment that does not comply with the requirements of this Code shall be subject to the provisions of Section 107 of Title 16 of the Delaware Code.

8-604.20 Refusal, Failure or Neglect to Comply with Order of the Regulatory Authority.

Any person (or responsible officer of that person) who violates a provision of this Code, and any person (or responsible officer of that person) who is the holder of a permit or who otherwise operates a food establishment that refuses, fails or neglects to comply with an order of the Regulatory Authority shall be subject to an administrative penalty of not less than \$100 and not more than \$1,000, together with costs.

8-604.30 Injunction. The Regulatory Authority may seek to enjoin violations of this Code.

8-604.40 Public Notification. A placard, as provided by the Division of Public Health, shall be prominently displayed at all entrances of food establishments that have failed to obtain a valid permit or have a permit that is suspended, revoked, or expired. This placard shall only be removed by order of the Regulatory Authority.”

14 DE Reg. 822 (02/01/11)

17 DE Reg. 1084 (05/01/14)

24 DE Reg. 158 (08/01/20) (Final)