
WEST VIRGINIA CODE CHAPTER 19
ARTICLE 11B

WV Legislature

§19-11B-1. Purpose.

The legislative intent of this article is to protect, promote and preserve the public health and general welfare and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale, and possession with intent to sell, frozen desserts and products resembling frozen desserts for human consumption. Further, the Legislature recognizes that advances in food technology have resulted in the development of a variety of products of similar usage as standardized frozen desserts that are so similar in appearance, odor and taste that they are difficult to differentiate from frozen desserts. Therefore, this article shall regulate these products in addition to frozen desserts, establish definitions and standards for such foods or labeling requirements by rules which effect their orderly marketing and ensure similar sanitary standards for frozen desserts and imitation frozen desserts.

Except where otherwise indicated, it is the intent of the Legislature that this article substantially conform with the federal regulations promulgated under the authority of the United States secretary of health and human services in order to provide for the movement of frozen desserts and imitation frozen desserts in interstate and intrastate commerce with a minimum of economic barriers.

§19-11B-2. Definitions.

(a) "Adulterated" means frozen desserts or imitation frozen desserts meeting one or several of the conditions listed in section five of this article.

(b) "Approved laboratory" means a laboratory approved by the commissioner under section nine of this article.

(c) "Clean" means the condition where no residue remains on a surface that will, or is likely to, cause adulteration.

(d) "Commissioner" means the commissioner of agriculture of the State of West Virginia or his or her duly authorized agent.

(e) "Distributor" means any person who distributes frozen desserts or imitation frozen desserts. The term does not include persons who are exclusively retailers and who are not engaged in the transportation of frozen desserts or imitation frozen desserts.

(f) "Distribute" means the act of transporting, holding for sale, offering for sale, selling, bartering, parceling out, giving or otherwise disposing of frozen desserts or imitation frozen desserts.

(g) "Embargo" means an order to withdraw a frozen dessert or imitation frozen dessert from distribution or to stop a manufacturing operation as provided in section ten of this article.

(h) "Freezer" means mechanical equipment used to lower the temperature of a mix, with or without incorporating air into the mix during the freezing process. Freezers may operate on a continuous or batch basis.

(i) "Frozen dessert" means ice cream, frozen custard, French ice cream, French custard ice cream, ice milk, goat's milk ice cream, goat's milk ice milk, fruit sherbet, nonfruit sherbets, frozen dietary dessert, frozen yogurt, frozen lowfat yogurt, milkshakes, any mix used to make such frozen desserts whether quiescently frozen or frozen while mixed and such other products as established by rule as a frozen dessert whether made with milk products from a cow or goat.

(j) "Imitation frozen desserts" means products that are manufactured, packaged or labeled so as to resemble the composition, physical and sensory properties of frozen desserts which contain milk products or milk-derived ingredients whether from a cow or a goat and which are intended to be used as a substitute for a frozen dessert. This term includes any mix used to manufacture imitation frozen desserts.

(k) "Label" means the display of written, printed or graphic matter upon or affixed to the package in which the frozen dessert or imitation frozen dessert is distributed.

(l) "Labeling" means all representations disseminated in any manner or by any means other

than by the label which induce or which are likely or intended to induce the purchase or use of frozen desserts or imitation frozen desserts.

(m) "Manufacture" means pasteurizing, ultrapasteurizing, formulating, compounding, freezing, processing or packaging a mix into a frozen dessert or imitation frozen dessert.

(n) "Manufacturer" means any person who manufactures frozen desserts or imitation frozen desserts.

(o) "Milk-derived ingredients" means whey, modified whey products, casein, caseinates, lactose, lactalbumins and lactoglobulins used in fluid, concentrated or dry form and other ingredients as established by rule as a milk-derived ingredient.

(p) "Milk products" means milk, acidified milk, cultured milk, concentrated milk, sweetened condensed milk, sweetened condensed skim milk, lowfat dry milk, nonfat dry milk, nonfat dry milk fortified with vitamins A and D, evaporated milk, evaporated skim milk, lowfat milk, acidified lowfat milk, cultured lowfat milk, skim milk, acidified skim milk, cultured skim milk, dry whole milk, cream, dry cream, heavy cream, light cream, light whipping cream, sour cream, acidified sour cream, eggnog, half-and-half, sour half-and-half, acidified sour half-and-half, butter, yogurt, lowfat yogurt, nonfat yogurt and such other products as established by rule as a milk product whether made with milk products from a cow or goat.

(q) "Milk fat" means fat in frozen desserts or imitation frozen desserts.

(r) "Misbranded" means frozen desserts or imitation frozen desserts meeting one or several of the conditions listed in section six of this article.

(s) "Mix" means the product made from wholesome ingredients that when frozen shall produce a frozen dessert or imitation frozen dessert.

(t) "Official sample" means any sample taken in accordance with the provisions of this article.

(u) "Package" means any container holding frozen desserts or imitation frozen desserts.

(v) "Pasteurized" means the process of uniformly heating every particle of a mix, holding in the heated state and cooling it, in equipment under conditions of temperature and time that is established in Grade "A" Pasteurized Milk Ordinance, 1989 revision, published by the United States department of health and human services: Provided, That nothing contained in this definition may be construed as barring any other process which may be approved by the commissioner or the state director of health that results in products that are free from pathogens.

(w) "Person" means any individual, partnership, association, fiduciary, firm, company, corporation or any organized group of persons whether incorporated or not. The term "person" extends to the agents, servants, officers and employees of the person.

(x) "Rerun" means a frozen dessert or imitation frozen dessert that is removed from a freezer and is intended to be reprocessed.

(y) "Retailer" means the person who sells frozen desserts or imitation frozen desserts to the ultimate consumer and who does not transport frozen desserts or imitation frozen desserts to or from the location of the freezer.

(z) "Sanitization" means the application of any effective method or substance to a clean surface for the destruction of pathogens, and other organisms as far as practicable. Such treatment shall not adversely affect the equipment, the dairy product or the health of the consumers consuming the products manufactured in the equipment and shall be a method acceptable to the commissioner.

(aa) "Transport" means the movement from one facility to another in a manner that maintains adequate temperatures and protects the product from freezing temperatures, exposure to the sun and from sources of contamination.

(bb) "Ultrapasteurized" means the process of heating every particle of a dairy product or mix at or above two hundred eighty degrees Fahrenheit for at least two seconds either before or after packaging so as to produce a product which has an extended shelf life under refrigerated conditions.

§19-11B-3. Frozen desserts manufacturer permit.

(a) A "frozen desserts manufacturer permit" shall be issued to each manufacturer of frozen desserts or imitation frozen desserts. Permits shall be issued for each place of operation and shall not be transferable with respect to persons or locations. The permit may be applied to the operation of several freezers at one location. Each mobile unit shall be considered as operating at one location.

(b) Application shall be made on forms supplied by the commissioner and provide such information as may be considered necessary by the commissioner. Permits shall be applied for at least fifteen days before the date that the current permit expires or within fifteen days of the date that the person intends to engage in business. The application shall be accompanied by a fee of \$20. A penalty of \$2 shall be added to all permits that are not applied for or renewed within this time limit. The permits shall expire on March 31 following date of issue: Provided, That firms that have a permit with an expiration date of June 30, 1991, on the date of implementation of this article shall be allowed to make application for a frozen desserts manufacturer permit for the period of July 1, 1991, through the March 31, 1992, at a fee of \$10.

(c) Permits shall be posted prominently at the place of operation.

§19-11B-4. Labeling.

(a) All packages of frozen desserts or imitation frozen desserts shall have a label upon or affixed to the package. The label shall be legible and of a print size and style easily readable by the ordinary citizen. The information required in this section shall be on each label and shall be stated in English.

(b) The label shall contain the following information:

- (1) The name of the product;
- (2) The quantity of the contents;
- (3) The name and address of the manufacturer, packer or distributor; and
- (4) Such other information as the commissioner shall establish by rule.

§19-11B-5. Adulteration.

Any frozen dessert or imitation frozen dessert referred to in this article is considered adulterated within the meaning of this article if it:

- (a) Bears or contains any poisonous or deleterious substance or compound in a quantity which may render it injurious to health;
- (b) Contains any coloring substance or flavoring matter that may be deleterious to health;
- (c) Bears or contains any added poisonous or deleterious substance for which no safe tolerance has been established by state or federal law or regulation or in excess of an established tolerance;
- (d) Does not meet the quality standards set forth in this article;
- (e) Is or has been manufactured under conditions not in conformity with the provisions of this article;
- (f) Is or has been produced, processed, prepared or held under unsanitary conditions;
- (g) Is or has been stored in a package composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;
- (h) Contains any substance added thereto or mixed or packed therewith so as to make it appear better or of greater value than it is; or
- (i) Meets or has met other conditions of adulteration as established by rule.

§19-11B-6. Misbranded.

Any frozen dessert or imitation frozen dessert referred to in this article is considered misbranded within the meaning of this article if:

- (a) It is labeled as a product for which there is a standard established by this article and it does not conform to such standards;
- (b) Its label or labeling is false or misleading in any particular;
- (c) It is not labeled in accordance with this article;
- (d) Any word, statement or other information required by this article to appear on the label or the labeling is not prominently placed thereon with such conspicuousness as compared with other words, statements, designs, or devices in the labeling and in such terms as to render it likely to be read or understood by the ordinary person under customary conditions of purchase and use;
- (e) If damage or inferiority has been concealed by any means; or
- (f) It meets or has met other conditions of misbranding as established by rule.

§19-11B-7. Prohibited acts.

(a) No person may distribute, sell, offer for sale, hold for sale or have in his possession with the intent to sell any frozen dessert or imitation frozen dessert which is adulterated or misbranded within the meaning of this article.

(b) No person may interfere with or prohibit the commissioner from performing the duties of his office.

(c) No person may fail to comply with the provisions of an embargo order issued under section ten of this article.

(d) No person may fail to comply with the provisions of a revocation, suspension or denial order issued under section eleven of this article.

(e) No person who in any official capacity obtains any information under the provisions of this article that would be considered trade secrets regarding the quality, source and disposition of frozen desserts or imitation frozen desserts may use this information to his or her own personal gain.

(f) No person may dispense or manufacture frozen desserts or imitation frozen desserts without a valid frozen desserts manufacturer permit.

(g) No person may distribute, sell, offer for sale, hold for sale or have in their possession with intent to sell, a frozen dessert or imitation frozen dessert in a container if the whole or any part of the items required by this article to be on the label have been altered, mutilated, destroyed, obliterated, removed, concealed, replaced or otherwise falsely represented.

(h) No person may alter or deface any items required by this article to be on the label after packaging.

(i) No person may offer for sale, transport, or distribution, frozen desserts or imitation frozen desserts subsequent to their packaging that have been allowed to exceed a temperature of forty-five degrees Fahrenheit for refrigerated noncultured products or zero degrees Fahrenheit for frozen products, except that mixes containing active cultures shall not be allowed to exceed a temperature of fifty degrees Fahrenheit. Mixes that have been sterilized and hermetically sealed and dry mixes are exempted from this provision.

(j) No person may haul frozen desserts or imitation frozen desserts in a vehicle that has previously been used to haul a chemical or foreign substance unless such vehicle has been cleaned according to the rules promulgated by the commissioner prior to the hauling of such frozen dessert or imitation frozen dessert.

(k) No person may sell or reprocess frozen desserts or imitation frozen desserts for human consumption that are in or have been in broken or opened retail packages. Nothing in this provision may prohibit the return of these containers to the manufacturer or distributor for

inspection purposes only.

(l) No person may distribute or use for human consumption products manufactured from returned packaged frozen desserts or imitation frozen desserts.

(m) No person may distribute or use mix that has been repasteurized subsequent to transportation in bulk, except for products that have been handled in a sanitary manner and maintained at forty-five degrees Fahrenheit or less prior to repasteurization.

(n) No person may sell, offer for sale or expose for sale any product containing milk products or milk-derived products that are from a herd that does not meet the requirements for animal health as required by rules promulgated under this article.

§19-11B-8. Approved sampling and testing methods.

(a) All sampling and testing methods shall be those set forth in the fifteenth edition of and supplement to the Official Methods of Analysis of the Association of Official Analytical Chemists, published by the Association of Official Analytical Chemists; or the fifteenth edition of the Standard Methods for the Examination of Dairy Products, published by the American Public Health Association, Inc.; or methods approved by the commissioner as provided by rule.

(b) The Babcock method or other methods approved by the commissioner for determining the milk fat content of frozen desserts shall be used as the reference method to establish and maintain the calibration of automated testing instruments.

§19-11B-9. Approved laboratories.

(a) Each person who desires to have his laboratory approved by the commissioner for testing official frozen dessert or imitation frozen dessert samples as provided in this section shall first satisfy the commissioner that tests to be made in such laboratory shall be conducted by qualified persons with adequate facilities and that such tests shall be performed accurately and according to approved methods.

(b) For the purpose of determining whether or not a laboratory shall be designated as an approved laboratory the commissioner shall designate a qualified person or persons to inspect the laboratory, its equipment, facilities and personnel at the expense of the applying laboratory, and thereafter may have similar inspections made at the expense of the applying laboratory for the purpose of determining whether or not such approval should be continued.

(c) The commissioner may accept the test results of any laboratory that has been approved under this article: Provided, That the commissioner shall not accept the test results of any approved laboratory for samples manufactured, distributed or used by a firm related to or owned by the approved laboratory.

§19-11B-10. Powers and duties of commissioner.

The commissioner has the power and duty to:

- (a) Adopt, promulgate and enforce rules to carry out the purpose of this article;
 - (b) Have access to and enter at all reasonable times all places where frozen desserts or imitation frozen desserts are manufactured, stored, held, transported, distributed or used in the state and where records, papers or documents relating to these transactions are kept;
 - (c) Inspect and photograph all places where frozen desserts or imitation frozen desserts are manufactured, packaged, stored, held, transported or distributed; inspect, audit and copy records and papers relating to the manufacturing, distribution, sampling, testing and sale of frozen desserts or imitation frozen desserts; examine measuring and testing apparatus; and examine equipment used in manufacturing and transportation of frozen desserts or imitation frozen desserts, except that inspections performed under authority of the provisions of article seven, chapter sixteen of this code will not be duplicated;
 - (d) Sample frozen desserts or imitation frozen desserts, including, but not limited to, ingredients and packages that are used in the manufacture of these products and may open any package containing or believed to contain any frozen dessert or imitation frozen dessert or an ingredient to be used in the manufacture of a frozen dessert or imitation frozen dessert for the purpose of inspecting and sampling;
 - (e) Issue, suspend, revoke or deny permits;
 - (f) Collect fees and expend moneys under the terms of this article;
 - (g) Collect evidence, including samples, of the condition of equipment, holding tanks, storage rooms and vehicles used, or intended to be used, in the processing, packaging, transporting or holding of frozen desserts or imitation frozen desserts;
 - (h) Examine the labels and labeling of frozen desserts and imitation frozen desserts;
 - (i) Issue embargoes for any product which is or is believed to be adulterated, misbranded or that is not in compliance with this article and to cause the manufacturing and distributing of same to cease. Nothing in this article may be construed as requiring the commissioner to issue embargoes for minor violations of this article when he or she believes that a written notice of violation will serve the public interest.
- (1) When an embargo is issued, the commissioner shall affix to such product or manufacturing device in an appropriate manner a tag or other marking giving warning that such product is under embargo.
 - (2) The commissioner shall give written notice to the custodian of the product or process under embargo describing the violation and stating that the product is prohibited from being

sold, offered for sale, exposed for sale or distributed and is ordered to be held on the premises and, further, that all manufacturing processes for this product shall cease until the embargo is released. This notice shall notify the custodian of the right to request an immediate hearing under the rules adopted by the commissioner.

(3) The commissioner shall take action to seize and condemn any product that cannot be brought into compliance with this article and the rules issued under same within ninety days of notice to the custodian of the product.

(4) The commissioner has the authority to issue an embargo against a perishable product, even if the practical result is to bring about the involuntary disposal of the product. The commissioner shall exercise this power using all reasonable means to determine if the product is adulterated or otherwise not in compliance with this article in as short a time frame as possible and shall promptly lift the embargo order if the product is found to be in compliance with this article;

(j) Establish, maintain and make provision for frozen dessert and imitation frozen dessert testing facilities; to establish reasonable fees for such tests and to incur such expenses as may be necessary to maintain and operate these facilities;

(k) Approve sampling and testing methods, and evaluate and approve official laboratories;

(l) Obtain from any state court an order directing any person to submit to inspection and sampling subsequent to the refusal of any person to allow inspection and sampling;

(m) Conduct hearings as provided by this article; and

(n) Assess civil penalties and refer violations to a court of competent jurisdiction: Provided, That the commissioner is not required to report for prosecution minor violations of the article when he or she believes that the public interest will be best served by a suitable notice in writing.

§19-11B-11. Suspension, revocation or denial of permits.

(a) The commissioner may deny any application for a permit whenever said permit has been applied for fraudulently, the applicant has grossly interfered with the duties of the commissioner or the applicant is determined to be not in compliance with or not able to comply with this article.

(b) The commissioner may suspend a permit whenever a health hazard exists or is believed to exist, said permit has been obtained fraudulently, the holder has grossly interfered with the duties of the commissioner or it is determined that the permit holder is dishonest, deceitful, incompetent or not in compliance with or is unable to comply with the provisions of this article. Any person whose permit has been suspended shall immediately discontinue all operations covered under the permit. The commissioner may issue a summary suspension in cases where violations of this article constitute a hazard to the public health, safety or welfare where the public interest requires immediate action.

(1) Except for summary suspensions, the commissioner shall give written notice to the persons affected of the pending suspension, stating that suspension of the permit is being contemplated and giving reasons therefor. The suspension notice shall appoint a time and place for hearing and shall be mailed by certified mail to the business address of the permit holder at least ten days before the date set for the hearing. The commissioner shall review the evidence presented at the hearing prior to issuing his decision.

(2) All summary suspensions shall be followed by a notice of suspension, the reasons for the suspension and an opportunity for a hearing in accordance with the provisions of this article.

(3) At the end of the period of suspension, the permit holder may resume operations without reapplication for a permit.

(c) The commissioner may revoke any permit issued under this article whenever a health hazard exists, the permit has been obtained fraudulently, the holder has grossly interfered with the duties of the commissioner or it is determined that the holder is dishonest, deceitful, incompetent or not in compliance with or is unable to comply with this article. Any person whose permit has been revoked shall immediately discontinue all operations covered under the permit.

(1) Before revoking any permit, the commissioner shall give written notice to the persons affected, stating that revocation of the permit is being contemplated and giving reasons for the revocation. The revocation notice shall appoint a time and place for hearing and shall be mailed by certified mail to the business address of the permit holder at least ten days before the date set for the hearing. The commissioner shall review the evidence presented at the hearing prior to issuing his decision.

(2) At the end of the period of revocation, the permit will not be issued without an application, payment of the required fee and compliance with all conditions that the

commissioner shall require for the reissuing of such permit.

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§19-11B-12. Hearings and appeals.

(a) Any person aggrieved by any action taken under this article shall be afforded the opportunity for a hearing before the commissioner under the rules promulgated by the commissioner.

(b) Hearings shall be conducted in accordance with procedures set forth by rule.

(c) All the testimony and evidence at a hearing shall be recorded by mechanical means, which may include the use of tape recordings. The mechanical record shall be maintained for 90 days from the date of the hearing and a transcript shall be made available to the aggrieved party.

(d) Any party who feels aggrieved of the suspension, revocation, or denial order may appeal to the Intermediate Court of Appeals pursuant to the provisions of §29A-5-4 of this code.

§19-11B-13. Criminal penalties; civil penalties; negotiated agreement.

(a) Criminal penalties. -- Any person violating any provision of this article or rule adopted hereunder is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than \$100 nor more than \$500 for the first offense, and for the second or subsequent offense, shall be fined not less than \$500 nor more than \$1,000, or imprisoned in the county jail not more than six months, or both fined and imprisoned. Magistrates have concurrent jurisdiction with circuit courts to enforce the provisions of this article.

(b) Civil penalties. --

(1) Any person violating a provision of this article or rules adopted hereunder may be assessed a civil penalty by the commissioner. In determining the amount of any civil penalty, the commissioner shall give due consideration to the history of previous violations of any person, the seriousness of the violation, including any irreparable harm to the environment, any hazards to the health and safety of the public and any economic damages to the public and the demonstrated good faith of any person charged in attempting to achieve compliance with this article before and after written notification of the violation.

(2) The commissioner may assess a civil penalty of up to \$1,000 for a violation.

(3) The civil penalty is payable to the State of West Virginia and is collectible in any manner now or hereafter provided for collection of debt. If any person liable to pay the civil penalty neglects or refuses to pay the same, the amount of the civil penalty, together with interest at ten percent, is a lien in favor of the State of West Virginia upon the property, both real and personal, of such a person after the same has been entered and docketed to record in the county where such property is situated. The clerk of the county, upon receipt of the certified copy of such, shall enter same to record without requiring the payment of costs as a condition precedent to recording.

(c) Notwithstanding any other provision of law to the contrary, the commissioner may promulgate and adopt rules which permit consent agreements or negotiated settlements for the civil penalties assessed as a result of violation of the provisions of this article.

(d) Upon application by the commissioner for an injunction, the circuit court of the county in which the violation is occurring, has occurred or is about to occur, as the case may be, may grant a temporary or permanent injunction restraining any person from violating or continuing to violate any of the provisions of this article or any rule promulgated under this article, notwithstanding the existence of other remedies at law. Any such injunction shall be issued without bond.

(e) No state court may allow for the recovery of damages for any administrative action taken, if the court finds that there was a probable cause for such action.

(f) It is the duty of the prosecuting attorney of the county in which the violation occurred to

represent the Department of Agriculture, to institute proceedings and to prosecute the person charged with such violation.

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§19-11B-14. Payment of fees.

All fees, penalties or other moneys collected by the commissioner under the provisions of this article shall be paid into a special account and expended upon the order of the commissioner for the purpose of the enforcement and administration of this article.

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§19-11B-15. Cooperation with other entities.

The commissioner may cooperate with and enter into agreements with governmental agencies of this state, other states, agencies of the federal government, agencies of foreign governments and private associations in order to carry out the purpose and provisions of this article.

WV Legislature

§19-11B-16. Confidentiality of trade secrets.

The commissioner may not make public information which contains or relates to trade secrets, commercial or financial information obtained from a person or privileged or confidential information: Provided, That when the information is necessary to carry out the provisions of this article, this information may be revealed, subject to a protective order, to any federal, state or local agency consultant or may be revealed, subject to a protective order, at a closed hearing or in findings of fact issued by the commissioner.