WEST VIRGINIA CODE CHAPTER 19 ARTICLE 35

WV Legislature

§19-35-1. Legislative findings and purpose.

(a) The Legislature hereby makes the following findings:

(1) Farmers markets are critical incubators for small farm and food businesses because they offer an inexpensive, accessible, entry-level market for reaching consumers directly, though research has shown that the average vendor makes only a nominal dollar amount in sales on any given market day;

(2) The number of farmers markets and the variety of products sold at farmers markets has increased significantly in the past 10 years, adding millions of dollars to the state's economy;

(3) Encouraging locally grown and raised food is important to the health and welfare of the citizens of West Virginia;

(4) Permit fees and requirements for farmers market vendors can vary widely from county to county and from one regulatory official to the other. Current food permit categories are not designed for farmers markets and their vendors, but rather for restaurants, grocery stores, or concessioners; and

(5) Food permits required for farmers market vendors are currently not recognized across county lines.

(b) It is the purpose of this article:

(1) To reduce barriers on participants producing, preparing, and selling certain foods at farmers markets and elsewhere within West Virginia;

(2) To place regulation of farmers markets, vendors, and local food producers primarily within the Department of Agriculture; and

(3) To encourage the growth of the local food industry in West Virginia.

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§19-35-2. Definitions.

For purposes of this article:

“Acidified food” means a low-acid food item to which acid or acid foods are added with a water activity of greater than 0.85 and a finished equilibrium of pH 4.6 or below. Acidified foods are considered potentially hazardous foods.

“Delivered” means transferred to the consumer, either immediately upon sale or at a time thereafter.

“Department” means the Department of Agriculture.

“Farm and food product” means any agriculture, horticulture, agroforestry, animal husbandry, dairy, livestock, beekeeping, or other similar product, and includes potentially hazardous foods and nonpotentially hazardous food produced or manufactured therefrom.

“Farmers market” means:

(1) A traditional farmers market in which two or more vendors gather to sell farm and food products directly to consumers at a fixed location;

(2) An on-farm market or farm stand run by an individual producer that sells farm and food products;

(3) An online farmers market in which two or more vendors collectively market farm and food products and retain ownership of those products until they are sold;

(4) A consignment farmers market in which two or more vendors deliver their own farm and food products to a common location maintained by a third party that markets the vendors’ products and receives a percentage share of the profits from sales, with the individual vendor retaining ownership of the farm and food product until it is sold. A consignment farmers market may be mobile or in a stationary location;

(5) A mobile farmers market;

(6) An area within a fair or festival at which farm and food products are sold; or

(7) Any other form of farmers market approved by the commissioner.

“Farmers market vendor” or “vendor” means a person or entity that sells farm and food products at a farmers market.

“Nonpotentially hazardous” means a food item that does not require time/temperature control for safety to limit pathogenic microorganism growth or toxin formation.

“Potentially hazardous” means a food item that requires time/temperature control or other

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protocols for safety to limit pathogenic microorganism growth or toxin formation.

To “produce” means to prepare a food item by cooking, baking, drying, mixing, cutting, fermenting, preserving, dehydrating, growing, raising, or other process.

“Producer” means the person who produces a nonpotentially hazardous food item.

“Retailer” means and includes every person engaging in the business of selling, leasing, or renting tangible personal property.

“Seller” means the person who sells a nonpotentially hazardous food item to a consumer. The seller of the nonpotentially hazardous food item may be the producer of the item, an agent of the producer, or a third-party vendor, such as a retail shop or grocery store.

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§19-35-3. Farmers markets.

(a) All farmers markets operating within the state shall register with the department. Farmers markets shall register on a form prepared by the department and provide information to the department regarding:

(1) The type of farmers market;

(2) The location, dates, and hours of operation;

(3) The farmers markets' vendors; and

(4) Any other information required by the department.

(b) Upon submission of all required items, each farmers market shall be issued a Farmers Market Registration. Each farmers market shall display its registration in a conspicuous manner.

(c) Except for consignment farmers markets, which are required to apply for and obtain a food establishment permit from a local health department, no other type of farmers market is required to apply for and obtain a food establishment permit from a local health department.

(d) The department may establish regulations permitting the sampling of certain farm and food products at farmers markets by vendors.

(e) The department may establish penalties for violation of this section by legislative rule, pursuant to the provisions of §29A-3-1 *et seq*. of this code.

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§19-35-3a. Farmers Market Vendor Permits.

(a) Except as provided in subsection (d) of this section, all vendors at a farmers market selling farm and food products shall apply for a farmers market vendor permit from the department.

(b) The farmers market vendor permit, once issued, is valid in all counties in this state.

(c) Notwithstanding any other provisions of code or rule to the contrary, a vendor is not required to obtain a food establishment permit to sell at a farmers market.

(d) The following vendors are exempt from obtaining a farmers market vendor permit:

(1) Vendors selling fresh, uncut produce;

(2) Vendors selling nonpotentially hazardous foods; and

(3) Vendors selling other farm and food products that are identified by the department.

(e) The department shall establish the conditions and procedures for issuance of farmers market vendor permits. As a condition of obtaining a farmers market vendor permit, a vendor may be required to satisfy additional requirements, including but not limited to, submitting to inspections, and obtaining and maintaining certain additional licenses or certifications.

(f) All farmers market vendor permits shall be displayed in a conspicuous manner.

(g) The department may establish penalties for violation of this section by legislative rule, pursuant to the provisions of §29A-3-1 *et seq*. of this code.

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§19-35-3b. Role of local health departments in farmers markets.

(a) No local health department may require a farmers market or a farmers market vendor to obtain a food establishment permit, except a consignment farmers market is required to obtain a food establishment permit: *Provided*, That nothing in this article shall be construed to exempt restaurants or other prepared food vendors from the requirement to obtain a food establishment permit.

(b) A vendor is subject to food sampling and inspection by the local health department in the jurisdiction in which the farmers market is located if the local health department determines that the vendor's food product is misbranded or adulterated, or if a consumer complaint has been received: *Provided*, That all sampling and inspection shall be performed in consultation with the Department of Agriculture.

(c) If the local health department in the jurisdiction in which the farmers market is located has reason to believe that an imminent health hazard exists it may invoke cessation of production until it deems that the hazardous situation has been addressed to the satisfaction of the local health department: *Provided*, That a local health department that invokes cessation of production under this subsection shall do so in consultation with the Department of Agriculture.

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§19-35-4. Legislative rules.

The department shall propose emergency or legislative rules for approval in accordance with the provisions of §29A-3-1 *et seq*. of this code for the purposes of implementing this article, including the setting of any fees.

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§19-35-5. Potentially hazardous foods.

(a) Notwithstanding any provision of §16-1-1 *et seq*. of this code or any rules or regulations to the contrary, the department shall regulate potentially hazardous foods sold at farmers markets.

(b) A vendor of potentially hazardous foods shall apply for and obtain a farmers market vendor permit as required by §19-35-3a of this code.

(c) A home, farm, community, or commercial kitchen may be used by a potentially hazardous foods vendor, as determined by the department.

(d) The department shall establish by legislative rule the requirements for obtaining a vendor permit for potentially hazardous foods, including acidified foods, and other categories identified and defined by the department.

(e) All potentially hazardous foods sold at farmers markets shall be labeled in compliance with the department's labeling standards and provide information about its content and sources.

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§19-35-6. Nonpotentially hazardous foods.

(a) The production and sale of nonpotentially hazardous foods, when done in conformity with this section and the accompanying legislative rules, are exempt from licensing, permitting, inspection, packaging, and labeling laws of this state.

(b) The following conditions apply to the sale and delivery of nonpotentially hazardous foods:

(1) The nonpotentially hazardous food item must be sold by the producer to the consumer, whether in person or remotely, or by an agent of the producer or a third-party vendor; and

(2) The nonpotentially hazardous food items must be delivered to the consumer by the producer, an agent of the producer, a third-party vendor, or a third-party carrier.

(c) All nonpotentially hazardous foods shall be labeled in compliance with the department's labeling standards and provide information about their content and sources.

(d) A home, farm, community, or commercial kitchen may be used by a nonpotentially hazardous foods vendor, as determined by the department.

(e) This section shall not be construed to:

(1) Impede the authority of a local health department or the department to investigate or cease the production or sale of food items reported to have caused a foodborne illness;

(2) Preclude the department from providing assistance, consultation, or inspection at the request of the producer of a nonpotentially hazardous food item;

(3) Preclude the production or sale of food items otherwise allowed by law;

(4) Exempt a producer, seller, third-party vendor, or third-party agent from any applicable tax law;

(5) Exempt producers or sellers of nonpotentially hazardous food items from any law that requires the producer, seller, third-party vendor, or third-party agent to register its business name, address, and other identification information with the state;

(6) Exempt producers or sellers of nonpotentially hazardous food items from any applicable law of the federal government, including any federal law prohibiting the sale of certain food items in interstate commerce; or

(7) Exempt producers or sellers of nonpotentially hazardous food items from any applicable law of another state.

(f) This section preempts county, municipal, and other political jurisdictions from prohibiting and regulating the production and sale of nonpotentially hazardous food items: *Provided*,

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That such preemption shall not include space rentals at government-owned or operated facilities, government-sanctioned or operated events, or product placement agreements with government-owned facilities, as well as temporary events 14 days or less in duration.

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