



Common Sense Initiative

Mike DeWine, *Governor*
Jon Husted, *Lt. Governor*

Joseph Baker, *Director*

MEMORANDUM

TO: Jamie Higley, Ohio Department of Health

FROM: Jacob Ritzenthaler, Business Advocate

DATE: January 3, 2024

RE: CSI Review – Food Service Operations (OAC 3701-21-01, 3701-21-02, 3701-21-02.1, 3701-21-02.2, 3701-21-02.3, 3701-21-02.4, 3701-21-02.5, 3701-21-02.6, 3701-21-02.7, 3701-21-03, 3701-21-22, 3701-21-25, 3701-21-26, 3701-21-27, and 3701-21-28)

On behalf of Lt. Governor Jon Husted, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Department as provided for in ORC 107.54.

Analysis

This rule package consists of thirteen amended rules, two new rules, and one rescinded rule proposed by the Ohio Department of Health (ODH) as part of the statutorily required five-year review requirement. This rule package was initially submitted to the CSI Office on April 20, 2021, and the public comment period was held open through May 20, 2021. The rule package was withdrawn for further discussion and resubmitted to the CSI Office on November 21, 2023, and the public comment period was held open through November 30, 2023. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on November 21, 2023.

Ohio Administrative Code (OAC) 3701-21 establishes requirements for food service operations, which include catering, food delivery, mobile food service, seasonal food service, temporary food service, and vending machines. OAC 3701-21-01 lists the definitions used throughout the rule and is amended to introduce definitions for "mobile catering food service operation" and to update existing definitions. OAC 3701-21-02 establishes requirements for food service operation licenses, including the timeframe for license application, descriptions of the health district with which a mobile food

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIPublicComments@governor.ohio.gov

operation must apply, and fees for license application. The rule is amended to require that the licensor submit a report of all food service operation licenses. OAC 3701-21-02.1 sets forth requirements for the establishment of license fees and categories and is amended to include reference to low-risk mobile food service operations. OAC 3701-21-02.2 requires a cost analysis to be performed by the licensing authority and is amended to remove one method for calculating support costs through the application of a negotiated indirect cost rate and calculation method approved by an agency of the federal government. OAC 3701-21-02.3 provides guidelines for determining the risk level of food service operations. Risk level I operations engage in food handling or preparation activities that can include sanitation, labeling, food source, storage, or expiration risks. Risk level II operations pose a higher potential risk due to hand contact or employee health concerns, and risk level III operations concern additional risks caused by cooking or cooling food, processing raw food, and issues caused by contamination or improper heat treatment. Risk level IV operations include additional preparation, storage, or demographic hazards. The rule is amended to include additional examples of activities associated with each risk level and additional new requirements for determining risk levels for mobile food service operations. OAC 3701-21-02.4 concerns the inspection frequency for food service operations and is amended to update requirements for maximum time between inspections of vending machines, and to establish a definition for “licensing period.” OAC 3701-21-02.5 rescinds and replaces the current rule and establishes the procedures for investigating complaints, including maintaining policies and documenting and reporting results.

OAC 3701-21-02.6 and 3701-21-02.7 list the procedures for resolving disputes between licensors and license holders and for providing enforcement support. The rules are amended to clarify requirements and to state that ODH is available to provide enforcement support. OAC 3701-21-03 requires the approval of a food service operation’s facility layout and equipment specifications and is amended to make minor language edits. OAC 3701-21-22 concerns ODH standards for first aid techniques for choking and is amended to remove a requirement for ODH to print these standards for distribution. OAC 3701-21-25 lists requirements for food protection certification, including course certification standards and curriculums. The rule is amended to include additional description of manager certification in food protection courses and additional requirements for courses to complete before administering examinations, in addition to removing requirements for instructors in manager certification to have four years’ experience. The rule is also amended to require that licensees maintain one person with person in charge certification per individual event for operations licensed on or after the effective date of the rule, as well as for licensees that have been implicated in a foodborne illness outbreak or have failed to maintain sanitary conditions as documented by the licensor. OAC 3701-21-26 lists the appeals procedures for a food service operation license and is amended to include clarifying updates. OAC 3701-21-27 concerns the embargo of food by referencing OAC 901:3-4-15 and is amended to remove unnecessary regulatory restrictions. OAC 3701-21-28 is a new rule that allows articles to be removed from use in a food service operation as specified in OAC 901:3-4-12.

During early stakeholder outreach, the rule package was reviewed during meetings of a committee formed to discuss upcoming mobile food service operations and mobile retail food establishments, as well as during meetings of the Retail Food Safety Advisory Council. During the initial CSI public comment period, CSI held discussions with ODH concerning comments received from the Greater Ohio Showmen Association (GOSA), which suggested that person in charge certification requirements were overly restrictive for licensees. GOSA stated that the requirements would present a burden on licensees who would become responsible for ensuring a certified employee is always on location, when licensees had previously covered events with multiple operations with a single certified person. After these discussions, ODH withdrew the rules and resubmitted the package to CSI with amendments that require that each licensee maintain one person with person in charge certification per individual event for operations licensed on or after the effective date of the rule, as well as for licensees that have been implicated in a foodborne illness outbreak or have failed to maintain sanitary conditions as documented by the licensor. These changes were approved by GOSA upon the resubmission of the rules to CSI.

The business community impacted by the rules includes local health districts and licensors, food service operations, food safety certification courses, and employees seeking certification. The adverse impacts created by the rules include complying with requirements for food and environment safety, as well as the costs associated with obtaining a license to operate from a local health district and completing certification training for food safety. ODH provides estimated costs in the BIA, stating that the average cost for an establishment under 25,000 square feet ranges from \$90 to \$714, while costs for establishments greater than 25,000 square feet will range from \$130 to \$1,400. Mobile licenses can cost from \$28 to \$458 and vending licenses can cost from \$11 to \$74. The cost of obtaining a person in charge food safety certification depends on the course selected and can range in cost from \$10 to \$30 and will take two to four hours to complete. ODH states that the adverse impacts are necessary to ensure that food service operations operate according to a set of standards that protect the health and safety of Ohioans.

Recommendations

Based on the information above, the CSI Office has no recommendations on this rule package.

Conclusion

The CSI Office concludes that ODH should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.