

**CABINET FOR HEALTH AND FAMILY SERVICES**  
**Department for Public Health**  
**Division of Public Health Protection and Safety**  
**(Amended After Comments)**

**902 KAR 45:005. Kentucky food code.**

RELATES TO: KRS 217.005-217.205, 217.280-217.390, 217.990-217.992, **219.011**

STATUTORY AUTHORITY: KRS 194A.050(1), 211.090(3), 211.180(1)(c), 217.125

NECESSITY, FUNCTION, AND CONFORMITY: KRS 194A.050(1), 217.125, 211.090(3), and 211.180(1)(c) authorize the Cabinet for Health and Family Services to regulate food service establishments and retail food stores. This administrative regulation establishes a uniform code for the regulation of all food service establishments and retail food stores for the purpose of protecting the public health.

Section 1. Definitions. (1) "2013 FDA Food Code" means the 2013 edition of the Food Code published by the U.S. Public Health Service and the U.S. Food and Drug Administration.

(2) "Cabinet" is defined by KRS 217.015(3).

(3) "Complex food preparation" means the process of preparing a food item that includes two (2) or more complete trips through the temperature danger zone between forty-one (41) degrees Fahrenheit and 135 degrees Fahrenheit.

(4) "Kentucky State Plumbing Code" is defined by KRS 318.130.

(5) "Person in charge" means the individual present at a food establishment who is responsible for the operation at the time of inspection.

(6) "Restricted concessions" means a food service establishment, whether mobile or stationary, limited to preparing and serving only menu items and ingredients considered to be low-risk in relation to foodborne illness.

(7) "Statewide mobile food unit" means a fully [-]enclosed, self-contained food service establishment that operates from a vehicle or is otherwise mobile[(-) "Temporary food establishment" is defined by KRS 217.015(45)].

Section 2. Revisions[Insertions and Modifications] to the 2013[2005] FDA Food Code. The 2013[(1) Except as provided by subsection (2) of this section, the 2005] edition of the FDA Food Code shall apply to Kentucky food establishments with the addition of the provisions established in this section[subsubsection]. (1)[(a)] FDA Food Code Subparagraph 2-102.11(B) shall be replaced with the following sentence:[-] Being a certified food protection manager who has shown proficiency of required information through passing a test that is part of an accredited program or a local health department class that addresses the food safety issues described in 2-102.11(C) of the 2013[2005] FDA food code.

(2) FDA Food Code Subparagraph 6-501.115 shall be supplemented with the Kentucky-specific exceptions established in this subsection.

(a) A dog may be allowed in an outdoor dining area if:

1. The outdoor dining area is not fully enclosed; and

2. There is an entrance to the outdoor dining area that is separate from the main entrance and the sole means of entry for a patron with a dog.

(b) Employees shall not permit a dog to come into physical contact with:

1. Food;

2. Serving dishes;

3. Utensils;

4. Tableware;
5. Linens;
6. Unwrapped single-service and single-use articles; or
7. Other food service items that **could[may]** result in contamination of food or a food-contact surface.

(c) An employee engaged in the preparation or handling of food shall avoid physical contact with a patron dog. If an employee has physical contact with a patron dog, the employee shall wash his or her hands prior to returning to work.

(d) All accidents involving dog vomit, feces, or urination shall be cleaned immediately and the area sanitized with an approved product. A kit with the appropriate materials for this purpose shall be made available for use in the designated outdoor dining area.

(e) Signage shall be posted at each entrance to the outdoor dining area stating **that dogs:**

1. **[Dogs]** May be allowed in the area;

2. **[Dogs]** Shall not be served food or water in wares used for human consumption;

3. **[Dogs]** Shall not be allowed on chairs, seats, or tables; and

4. **[Dogs]** Shall be kept on a leash and under the control of an adult at all times.

(f) The food establishment may refuse to serve the patron with a dog if:

1. The patron fails to exercise reasonable control over the dog; or

2. The dog is behaving in a manner that compromises or threatens to compromise the health or safety of any person present~~[(b) FDA Food Code Subparagraph 3-301.11(D). Food employees not serving a highly susceptible population may contact exposed, ready-to-eat food with their bare hands if the permit holder has a written policy that addresses hand washing while processing, preparing, and serving all ready-to-eat foods; and~~

~~(c) FDA Food Code Subparagraph 8-302.11.~~

~~1. A mobile food unit shall not operate for more than fourteen (14) consecutive days at one (1) location.~~

~~2. After the fourteen (14) consecutive days has expired, a mobile food unit shall not operate at the same location until a period of thirty (30) days has elapsed.~~

~~(2) The following provisions of the 2005 FDA Food Code shall not apply to Kentucky food establishments.~~

~~(a) FDA Food Code Subparagraph 3-301.11(D)(1).~~

~~(b) FDA Food Code Subparagraph 3-301.11(D)(2)(a).~~

~~(c) FDA Food Code Subparagraph 3-301.11(6)(e).~~

~~(d) FDA Food Code Subparagraph 8-811.10 (B).~~

~~(e) FDA Food Code Annex 7: Form 3-A, Food Establishment Inspection Report].~~

Section 3. Statewide Mobile Food Units. (1) All food products served in a statewide mobile food unit shall be cooked or prepared in:

(a) A statewide mobile food unit permitted by the cabinet; or

(b) A food service establishment permitted by the cabinet.

(2) Complex food preparation shall not be performed in a statewide mobile food unit.

(3) The statewide mobile food unit shall not serve as a catering operation unless it meets additional permitting requirements **as a catering kitchen.**

(4) The statewide mobile food unit shall be serviced and cleaned every day of operation.

(5) The statewide mobile food unit shall meet the sanitation and plumbing requirements contained in the 2013 FDA Food Code and the Kentucky State Plumbing Code.

(6) Sewage and other liquid wastes shall be removed according to the 2013 FDA Food Code and the Kentucky State Plumbing Code.

Section 4. Restricted Concessions. (1) Restricted concessions may include:

(a) Flavored ice;

(b) Shaved ice;

(c) Snow cones with commercially mixed and packaged flavorings;

(d) Pork rinds;

(e) Roasted peanuts, almonds, pecans, or walnuts, without the shell;

(f) Nacho cheese and chips;

(g) Cotton candy;

(h) Pre-cooked, commercially processed hotdogs, frankfurters, or similar meats (such as bratwurst or Italian sausage) that are grilled, steamed, or boiled on-site;

(i) Pre-packaged sandwiches;

(j) Pre-packaged ice cream or popsicles;

(k) Prepackaged, commercially processed snack foods (such as pretzels or chips) from a state or federal permitted food manufacturer[an approved manufacturing source];

(l) Shelf-stable, pre-packaged baked goods; or

(m) Commercially produced bottled or canned soft drinks, water, ice tea, or lemonade.

(2) Sanitation requirements.

(a) If public water is available, a restricted concession facility shall follow the requirements of the Kentucky State Plumbing Code.

(b) If public water is not available, a restricted concession facility may operate under temporary sanitation if:

1. There is an adequate amount of stored potable water available;

2. Tubs, buckets, or similar containers for washing, rinsing, and sanitizing equipment large enough to completely immerse the largest item used in operation are available;

3. There are adequate hand washing facilities; and

4. Permanent or portable toilet facilities are conveniently located and have hand washing facilities available.

(c) The restricted concession facility shall provide adequate cold and hot storage for food products and safe storage areas for the storage of dry food and single service articles.

(d) A restricted concession facility shall be constructed or located in such a way that food and utensils **shall be[are]** protected from potential contamination, including from insects, dust, and debris.

Section 5. Bed and Breakfast. (1) A bed and breakfast establishment shall not be subject to this administrative regulation if:

(a) The bed and breakfast establishment is:

1. In a one (1) family, privately owned residential dwelling unit that has guest rooms or suites used, rented, or hired out for occupancy; and

2. Occupied for sleeping purposes by persons not affiliated by the single-family unit;

(b) The owner or caretaker of the bed and breakfast establishment resides on the premises or property adjacent to the premises during the periods of occupancy;

(c) The number of available guest rooms does not exceed nine (9);

(d) The number of overnight guests does not exceed eighteen (18); and

(e) Breakfast and other meals are served.

(2) Guests shall be informed by placards posted at the registration area that the food is prepared in a kitchen that is not regulated and inspected by the regulatory authority.

(3) A bed and breakfast establishment that does not meet all of the requirements established in subsection (1)(a) to (e) of this section shall meet the requirements of this administrative regulation.

Section 6. Inspections and Violations. (1) If an inspection is made of an establishment, the findings shall:

(a) Be recorded on Form DFS-208, Food Establishment Inspection Report, using the:  
1. 1/09 edition for an inspection conducted before July 1, 2019; or

2. 10/17 edition for an inspection conducted on or after July 1, 2019; and

(b)[shall] Constitute a written notice to the permit holder.

(2) A copy of the inspection report shall be provided~~[furnished]~~ to the permit holder or person in charge.

(3) The inspection report form shall summarize the requirements of this administrative regulation and shall set forth a point value for each requirement.

(4) The rating score of the establishment shall be the total of the point value for all violations subtracted from 100.

(5) The inspection report form shall specify a period of time for the correction of the violations found pursuant to this subsection.~~[the following provisions:]~~

(a) If the rating score of the establishment is eighty-five (85) or more, all violations of one (1) ~~or two (2)~~ point items shall be corrected prior to the next routine inspection.

(b) If the rating score of the establishment is at least seventy (70) but not more than eighty-four (84), all violations of one (1) ~~or two (2)~~ point items shall be corrected within a period not to exceed thirty (30) days.

(c) Regardless of the rating score of the establishment, all violations of priority ~~[three (3), four (4), or five (5) point]~~ items shall be corrected within a time period ~~[specified by the cabinet but]~~ not to exceed ten (10) days.

(6) The inspection report shall state that:

(a) Failure to comply with a time limit for correction may result in the suspension of a permit; and

(b) An opportunity for appeal shall be provided if a written request for a hearing is filed in accordance with 902 KAR 1:400.

Section 7. Permit Suspension. (1)~~(d)~~ If the rating score of the establishment is less than seventy (70), the establishment shall be issued a Form DFS-214, Notice of Enforcement~~[notice]~~ of intent to suspend the permit~~[, using form DFS-214 Enforcement Notice. The permit shall be suspended within ten (10) days after receipt of the notice unless a written request for a hearing is filed]~~ in accordance with 902 KAR 1:400.

~~(2)(e)~~ A permit shall be suspended immediately upon notice to the permit holder without a hearing if:

~~(a)[1.]~~ The cabinet has reason to believe that an imminent public health hazard exists;

~~(b)[2.]~~ The permit holder or an authorized agent has interfered with the cabinet in the performance of its duties after its agents have duly and officially identified themselves; or

~~(c)[3.]~~ An inspection of an establishment reveals a rating score of less than sixty (60).

~~(3)(f)~~ A permit holder subject to ~~[the immediate]~~ suspension of a permit may submit a~~[make application on]~~ Form DFS-215, Application for Reinstatement, in accordance with 902 KAR 1:400~~[Re-Instatement of Suspended Permit, for the purpose of reinstatement of suspended permit.~~

~~(g) All violations concerning a temporary food service establishment shall be corrected within twenty-four (24) hours.~~

~~1. If violations are not corrected within the required twenty-four (24) hour time period, the permit shall be immediately suspended].~~

~~(4)[2.]~~ The permit holder whose permit has been suspended may request a hearing in ac-

cordance with 902 KAR 1:400[using form DFS-212].

~~(5)(h)~~ If a food service establishment is required under the provisions of this administrative regulation to cease operations, it shall not resume operations until a reinspection determines that conditions responsible for the requirement to cease operations no longer exist.~~(j) An opportunity for reinspection shall be offered within seven (7) days of the cabinet's receipt of the form DFS-215.~~

~~(6) The inspection report shall state that:~~

~~(a) Failure to comply with a time limit for correction may result in the suspension of a permit; and~~

~~(b) An opportunity for appeal will be provided if a written request for a hearing is filed in accordance with 902 KAR 1:400.]~~

Section 8[4]. **Methods of Conducting Evaluations of Retail Food Programs. The evaluation and standardization procedures for retail food programs shall be governed by the FDA Procedures for Standardization of Retail Food Safety Inspection Officers, Procedures Manual**~~[Effective Date. An amendment to this administrative regulation]~~~~[This Code and the rules, administrative regulations, provisions, requirements, and orders]~~**shall take effect six (6) months**~~[one (1) year]~~~~[from the effective date of this administrative regulation]~~~~[approval].~~

Section 9[5]. Incorporation by Reference. (1) The following material is incorporated by reference:

(a) "Food Code", U.S. Public Health Service, FDA, 2013~~;~~~~[2005.]~~

(b) **"FDA Procedures for Standardization of Retail Food Safety Inspection Officers, Procedures Manual", U.S. Public Health Service, 2015;**

~~(c)~~**"DFS-200, Facility Profile"**, edition 07/01;

~~(c)~~ "DFS-202, Application for a Permit to Operate a Temporary, Fee Exempt or Farmer's Market Temporary Food Service Establishment", edition 04/07;

~~(d)~~ "DFS-208, Food Establishment Inspection Report", edition 10/17;

~~(d)~~~~(e)~~[1/09;

~~(e)~~ "DFS-210, Notice to Correct Violations", edition 02/95;

~~(f)~~ "DFS-212, Request for Conference", edition 10/96;

~~(g)~~ "DFS-213, Notice of Conference", edition 08/96;

~~(h)~~ "DFS-214, Notice of Enforcement [~~Notice to Apply for Permit, Order to Cease Operation, or Permit Suspension and Order to Cease Operation~~]", edition 3/2018~~[08/96]~~; and

~~(e)~~~~(d)~~~~(i)~~ "DFS-215, Application for Reinstatement~~[Re-instatement of Suspended Permit]~~", edition 03/2018~~[02/95]~~;

~~(j)~~ "DFS-216, Record of Complaint and Investigation", edition 04/95;

~~(k)~~ "DFS-218, Concessionaires Food Sanitation Guidelines", edition 05/94;

~~(l)~~ "DFS-222, Notice and Order of Quarantine", edition 05/94;

~~(m)~~ "DFS-223, Tag Quarantined", edition 10/90;

~~(n)~~ "DFS-224, Label for Sample Collection and Analysis", edition 09/87; and

~~(o)~~ "DFS-232, Permit to Operate Temporary, Fee Exempt Food Service or Farmer's Market Temporary Food Service Establishment", edition 04/07].

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at Cabinet for Health and Family Services, Department for Public Health, Division of Public Health Protection and Safety, Food Safety Branch, 275 East Main Street, Frankfort, Kentucky 40621, Monday through Friday, 8 a.m. to 4:30 p.m.

JEFFREY D. HOWARD, JR., M.D., Commissioner  
ADAM M. MEIER, Secretary

APPROVED BY AGENCY: December 10, 2018

FILED WITH LRC: December 13, 2018 at 4 p.m.

CONTACT PERSON: Chase Coffey, Executive Administrative Assistant, Office of Legislative and Regulatory Affairs, 275 East Main Street 5 W-A, Frankfort, Kentucky 40621, phone 502-564-6746, fax 502-564-7091, email CHFSregs@ky.gov.

## REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Persons: Julie Brooks, (502) 564-3970, julied.brooks@ky.gov; and Chase Coffey

(1) Provide a brief summary of:

(a) What this administrative regulation does: Risk factors such as food preparation practices and employee behavior are commonly reported by the Centers for Disease Control and Prevention as contributing factors in foodborne illness outbreaks. This administrative regulation establishes a uniform code for the regulation of all food service establishments and retail food stores for the purpose of protecting the public health.

(b) The necessity of this administrative regulation: KRS 194.050(1) authorizes the Cabinet for Health and Family Services to promulgate administrative regulations to protect the health of the citizens of the Commonwealth. KRS 217.125 authorizes the cabinet to promulgate administrative regulations for permits to operate food service establishments consistent with the federal act and the Fair Packaging and Labeling Act. This administrative regulation includes the provisions for issuing permits to food service establishments, inspections and violations of the food code, and the provisions for suspension and reinstatement of permits. KRS 211.180(c) authorizes the cabinet to promulgate administrative regulations for the safe handling of food and food products.

(c) How this administrative regulation conforms to the content of the authorizing statutes: This administrative regulation adopts the FDA Food Code except where exclusions may be applicable. This administrative regulation also allows for permitting and inspection of food service establishments.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation provides a uniform standard for the permitting and inspection of all food service establishments.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: The amended after comments version of this administrative regulation includes the standardized methods for inspection of retail food programs; clarifies that the inspection process will change beginning July 1, 2019; clarifies the permitting requirements for a statewide mobile food unit that also wants to operate as a catering kitchen; clarifies what constitutes an approved manufacturing source for restricted concessions; and makes KRS Chapter 13A drafting changes.

(b) The necessity of the amendment to this administrative regulation: The amended after comments version is necessary to comply with KRS Chapter 13A drafting rules, to provide clarification on the effective date for the changes to the inspection process, and to ensure standard methods for evaluation of retail food programs are implemented across the state.

(c) How the amendment conforms to the content of the authorizing statutes: KRS 217.125 requires the cabinet to be consistent with the regulations promulgated under the federal act and Fair Packaging and Labeling Act. By updating the Kentucky Food Code to the 2013 FDA Food Code, the cabinet will be in full compliance with the authorizing statute.

(d) How the amendment will assist in the effective administration of the statutes: The delayed effective date of the changes to the inspection process will ensure food safety inspectors are adequately trained to perform a risk based inspection in compliance with the incorporated FDA Food Code and allow the regulated entities time to make any needed changes to be in full compliance with the code as well.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: All food service establishments, retail food stores, temporary food service establishments, restricted food service establishments, non-permanent facilities of these types, including any and all food service activities that constitute food service to the public. Currently there are approximately 25,000 permitted facilities of these types. All county health departments are affected by this administrative regulation as agents of the cabinet with respect to enforcement responsibilities and the Department for Public Health, Division of Public Health Protection and Safety, Food Safety Branch, is also affected by this administrative regulation.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in questions (3) will have to take to comply with this administrative regulation or amendment: Each entity impacted by this administrative regulation will have to conform to changes not consistent with the previous food code. The differences are with the modernization of the code to include the most up to date scientific knowledge. These changes reflect an emphasis on food protection through risk based procedures rather than solely on facility management. The result is improved food safety through a risk based approach backed by science. Their action will be to learn the changes and put them in place as they apply to their operation.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the identities identified in question (3): Initially some establishments will have to make minor adjustments in equipment and training for staff. It is difficult to quantify this amount for such a wide-ranging group.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): No additional cost will be incurred with this amendment.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: There will be no new cost to implement this administrative regulation.

(b) On a continuing basis: There will be no additional ongoing cost to implement this administrative regulation.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Agency funds.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new or by the change, if it is an amendment: There will be no increase in fees or funding as a result of changes to this administrative regulation.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees. There are no fees established in this administrative regulation.

(9) TIERING: Is tiering applied? Tiering is applied in this administrative regulation as there are separate requirements for food service establishments, statewide mobile food trucks, and bed and breakfast establishments.

## FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? Local Health Department food inspectors and the Department for Public Health will be impacted by this administrative regulation.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. The 2013 FDA Retail Food Code is incorporated by reference. KRS 217.125 authorizes the cabinet to promulgate administrative regulations for the issuance of permits for food service establishments and to outline the conditions for suspension and reinstatement of the permit. KRS 194A.050 authorizes the cabinet to promulgate administrative regulations to protect the health of citizens of the Commonwealth. KRS 211.180(1)(c) authorizes the cabinet to promulgate administrative regulations for the safe handling of food and food products.

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? This administrative regulation does not generate revenue.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? This administrative regulation does not generate revenue.

(c) How much will it cost to administer this program for the first year? Not applicable

(d) How much will it cost to administer this program for subsequent years? Not applicable

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation: