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## **TITLE 410 INDIANA STATE DEPARTMENT OF HEALTH**

### **Proposed Rule** LSA Document #05-320

#### **DIGEST**

Amends 410 IAC 7-22-15 to establish standards for the certification of food handlers for food establishments and the imposition of penalties for violations. Effective 30 days after filing with the Secretary of State.

#### **IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses**

##### **Description of Rule:**

The Indiana State Department of Health (ISDH) has responsibility for the regulation of certified food handlers in food establishments across the state. In 2001 the Indiana General Assembly adopted Senate Enrolled Act 404 that created IC 16-42-5.2 requiring that food establishments employ a certified food handler. The statute mandated that the ISDH adopt rules to administer the new law and establish monetary penalties for noncompliance. The ISDH adopted those rules, and the certified food handler requirement became effective January 1, 2005. Since the adoption of the ISDH certified food handler rule, there have been two separate legislative changes to the controlling statute. The result is that the existing food handler certification rule, 410 IAC 7-22, is no longer consistent with the statute. The purpose of the amendments to the rule is to make the rule consistent with the statute by incorporating the additional exemptions established when IC 16-42-5.2-2 and IC 16-42-5.2-3 were amended and IC 16-42-5.2-3.5 was added.

##### **Fiscal Impact**

Indiana Code 4-22-2-28(c) requires an agency to submit to the Office of Management and Budget any proposed rule with an estimated economic impact of greater than \$500,000 on all persons regulated by the rule. After the preliminary adoption of such a rule, the Office of Management and Budget must prepare a fiscal impact statement concerning the effect that compliance with the proposed rule will have on the state and all persons regulated by the proposed rule.

The department reviewed the proposed rule to determine whether the total economic impact of the rule on regulated persons will exceed \$500,000. The department determined, based on the information available at the time of the rule promulgation, that the proposed rule does not have an estimated economic impact of greater than \$500,000 on the persons regulated by the rule. The ISDH therefore did not submit the proposed rule to the Office of Management and Budget prior to the rule being adopted.

##### **Economic Impact on Small Businesses**

##### **1. Estimate of the number of small businesses, classified by industry sector, that will be subject to the proposed rule.**

IC 4-22-2.1-4 defines a small business as any person, firm, corporation, limited liability company, partnership, or association that:

- (1) is actively engaged in business in Indiana and maintains its principal place of business in Indiana;
- (2) is independently owned and operated;
- (3) employs one hundred (100) or fewer full-time employees; and
- (4) has gross annual receipts of five million dollars (\$5,000,000) or less.

The two major North American Industry Classification System (NAICS) categories for food establishments affected by this rule are NAICS 722000 (Food Services and Drinking Places) and NAICS 445000 (Food and Beverage Stores). The last time ISDH and local health departments conducted an inventory of food establishments in Indiana was 1994. At that time approximately 27,000 food establishments were found to be operating. In 1994, Indiana's population was approximately 5,752,000. The U.S. Census Bureau estimates that Indiana's population in 2005 was 6,272,000. Extrapolating based on the increase in population from 1994 to 2005, there should be at least 29,440 food establishments currently operating in Indiana. But since the trend is for people to dine out more than in the past, ISDH estimates that the number of food establishments currently operating in Indiana is closer to 30,000. While some of these facilities are owned and operated by chains that qualify as large businesses, the vast majority of restaurants, and many groceries qualify as small businesses.

This proposed rule revision will reduce the number of establishments subject to 410 IAC 7-22. In compliance with IC 16-42-5.2 as amended, this revision would exempt from compliance the following categories of facilities that may qualify as food establishments: 1) community mental health centers; 2) private mental health institutions; 3) area agencies on aging; 4) food pantries; and 5) organizations exempt from state retail gross retail tax. ISDH records indicate that there are a total of 30 community mental

health centers and private mental health institutions in Indiana. Likewise, there are a total of 289 area agencies on aging. According to the Indiana Family and Social Services Administration, there are approximately 600 food pantries operating in Indiana. ISDH has no way to estimate the number of organizations exempt from state retail gross retail tax that qualify as food establishments. An anomaly in the law is that IC 16-42-5.2 originally required food establishments exempt from state retail gross retail tax to retain the services of a certified food handler, yet IC 16-42-5-4 exempted those same facilities from compliance with ISDH's food sanitation rules. Because of this anomaly, neither ISDH nor the local health departments had attempted to force such food establishments to comply with IC 16-42-5.2; neither did we try to inventory them. Since we have not tried to apply the law to these facilities, they have not been impacted, and this rule revision assures that they won't be in the future. Based on the foregoing, ISDH estimates that the total number of food establishments impacted by this rule revision will be 919 and the impact will be to exempt them from the rule requirements.

**2. Estimate of the average annual reporting, record keeping, and other administrative costs that small businesses will incur to comply with the proposed rule.**

There are no record keeping requirements associated with ISDH's food handler certification rule, 410 IAC 7-22. The rule simply requires that there be a certified food handler at or available to each affected food establishment and that their food handler certificate be posted in the food establishment where it can be observed by ISDH or the local health department at the time of any inspection.

Likewise, there are no record keeping requirements associated with ISDH's food handler certification rule. Hence, there are no record keeping costs.

There is an administrative cost for the third-party training course and accompanying test to become a certified food handler, which averages \$125 per person. As stated previously, ISDH estimates that the number of food establishments currently operating in Indiana is approximately 30,000. However, a goodly number of food establishments were exempt from the requirements of IC 16-42-5.2 as originally enacted. Neither ISDH nor the local health departments have inventoried food service establishments since 1994, so we do not have data about how many of the estimated 30,000 facilities are exempt from the law as originally enacted. However, we do have data about the number of food establishments that are newly exempt from IC 16-42-5.2, because of the amendments recently enacted. As stated previously, those facilities total 919. Therefore, adoption of this rule revision to comport with IC 16-42-5.2 as amended, will result in a savings of  $919 \times \$125 = \$114,875$ , in administrative costs for small business.

**3. Estimate of the total annual economic impact that compliance with the proposed rule will have on all small businesses subject to the rule.**

The proposed rule results in a decrease in economic impact to small businesses as compared to the current rule. The current rule requires every food establishment to have a certified food handler. In estimating the cost of that requirement, all three third-party training and testing agencies approved by the ISDH to certify food handlers in Indiana issue certificates that are valid for a period of five years. After that, the individual must renew his/her food handler certification, again at a cost of \$125 per person. As stated previously, the ISDH estimates that the number of food establishments currently operating in Indiana is approximately 30,000. However, a goodly number of food establishments were exempt from the requirements of IC 16-42-5.2 as originally enacted. Neither ISDH nor the local health departments have inventoried food service establishments since 1994, so we do not have data about how many of the estimated 30,000 facilities are exempt from the law as originally enacted. Assuming that each of the 30,000 facilities had to comply with IC 16-42-5.2, the average annual economic impact of the current rule would be the cost of food handler certification or renewal every five years, or  $30,000 \times \$125$ , divided by 5 years = \$750,000.

Because of the exemptions newly created through amendment of IC 16-42-5.2, which ISDH proposes to revise 410 IAC 7-22 to comport with, there will be a savings of approximately \$125, divided by 5 years = \$25 per year for each facility that will be newly exempted. Since there are 919 newly exempted facilities, the annual savings resulting from this rule revision will be  $919 \times \$25 = \$22,975$ .

**4. Statement justifying any requirement or cost that is imposed on small businesses by the rule; and not expressly required by the statute authorizing the agency to adopt the rule; or any other state or federal law.**

ISDH believes the proposed rule revision meets the requirements established in the applicable statutes, as amended. We are proposing revisions to 410 IAC 7-22 to comply with amendments made to its authorizing statute, IC 16-42-5.2. There are no costs associated with this proposed rule revision not expressly authorized by the statute.

**5. Regulatory Flexibility Analysis**

**A. Establishment of less stringent compliance or reporting requirements for small businesses.**

This proposed rule revision does not include any reporting requirements. Neither do other parts of the original rule. It requires only that each food establishment subject to IC 16-42-5.2 retain the services of a certified food handler. There are no lesser options for compliance available, or even possible, under the authorizing statute.

**B. Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses.**

This proposed rule revision does not establish any deadlines other than what IC 16-42-5.2 requires. Neither do other parts of the original rule. There are no less stringent deadlines available, or even possible, under the authorizing statute.

**C. Consolidation or simplification of compliance or reporting requirements for small businesses.**

This proposed rule revision does not include any reporting requirements. Neither do other parts of the original rule. Compliance is determined when ISDH or the local health department, as part of a routine inspection, checks to see whether or not there is a food handler certificate posted in the food establishment at the time of inspection.

**D. Establishment of performance standards for small businesses instead of design or operational standards imposed on other regulated entities by the rule.**

Both the original rule and the revisions proposed comprise a performance standard - that there be a certified food handler at or available to a food establishment. There are no design or operational standards in 410 IAC 7-22 or the revision proposed.

**E. Exemption of small businesses from part or all of the requirements or costs imposed by the rule.**

The purpose of the proposed rule revision is provide exemptions to small businesses to the extent that IC 16-42-5.2 allows.

**Conclusion**

The proposed rule revision will reduce the economic impact on selected small businesses to the extent that IC 16-42-5.2 allows.

**410 IAC 7-22-15**

SECTION 1. 410 IAC 7-22-15 IS AMENDED TO READ AS FOLLOWS:

**410 IAC 7-22-15 Certified food handler requirements**

**Authority:** IC 16-42-5.2-13

**Affected:** IC 6-2.5-5-21; IC 12-7-2-38; IC 12-10-1; IC 12-10-15; IC 12-25; IC 16-21; IC 16-28; IC 16-42-5.2; IC 23-2-4

Sec. 15. (a) A corporation or local health department may not impose any registration, certification, or licensing requirements on food handling or food handlers.

(b) After December 31, 2004, at least one (1) food handler at a food establishment must be a certified food handler. A food handler's certification must be recognized by the Conference for Food Protection or an equivalent nationally recognized certification examination as determined by the department.

(c) A food establishment shall have at least one (1) certified food handler responsible for all periods of the food establishment's operation. However, a certified food handler need not be present at the food establishment during all hours of operation. It shall be the responsibility of the certified food handler to provide the certificate, letter, or document for verification of passing the examination.

(d) A food establishment that begins operation or changes ownership shall comply with ~~section 15(b) of this rule~~ **subsection (b)** not later than six (6) months after beginning operation or changing ownership.

(e) If a food establishment does not have a certified food handler because the certified food handler terminates employment with the food establishment, the owner or operator of the food establishment shall comply with ~~section 15(b) of this rule~~ **subsection (b)** not later than three (3) months after the termination date of the previous certified food handler.

(f) If more than one (1) food establishment operated by the same individual is located on the same property or on contiguous properties, only one (1) certified food handler is required for the food establishments.

(g) **Except as provided in subsection (h),** the certified food handler requirement does not apply to a food establishment when the food establishment's food handling activities are limited solely to one (1) or more of the following:

(1) Heating or serving precooked ~~hot dog or sausage products, popcorn, nachos, pretzels, or frozen pizza.~~ **foods.**

(2) Preparing or serving a continental breakfast, such as:

(A) rolls;

(B) coffee;

(C) juice;

(D) milk; and

(E) cold cereal.

(3) Preparing or serving nonalcoholic or alcoholic beverages **that are not potentially hazardous beverages** or ice.

(4) **Preparing or serving packaged or unpackaged foods that are not potentially hazardous foods, including the following:**

(A) **Elephant ears.**

(B) **Funnel cakes.**

- (C) Cotton candy.
- (D) Confectionaries.
- (E) Baked goods.
- (F) Popcorn.
- (G) Chips.

(H) Grinding coffee beans.

~~(5) Packaged foods that are not potentially hazardous foods in accordance with the rules adopted by the executive board.~~

~~(6) Heating when it is the only step for a bakery product. or~~

~~(7) (5) Providing prepackaged food in its original package.~~

**(h) A food establishment that has more than ten thousand (10,000) square feet in total retail sales space at the food establishment location must comply with this rule. This does not apply to a pharmacy that is a food establishment that provides only prepackaged food products for sale.**

~~(i)~~ **(i) The certified food handler requirement does not apply to the following institutions:**

(1) Hospitals licensed under IC 16-21.

(2) Health facilities licensed under IC 16-28.

(3) Housing with services establishments that are required to file disclosure statements under IC 12-10-15. ~~or~~

(4) Continuing care retirement communities required to file disclosure statements under IC 23-2-4.

**(5) Community mental health centers (as defined in IC 12-7-2-38).**

**(6) Private mental health institutions licensed under IC 12-25.**

**(7) An area agency on aging designated under IC 12-10-1 that provides food under a nutrition service program. However, the premises where the food is prepared is not exempt from the requirements under this rule.**

**(8) A food pantry that:**

**(A) is operated or affiliated with a nonprofit organization that is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code; and**

**(B) distributes food, which may include food from the United States Department of Agriculture, to needy persons.**

**(j) A food bank or other facility that distributes donated food to other organizations is not exempt from the requirements of this rule.**

**(k) An organization that is exempt from the state gross retail tax under IC 6-2.5-5-21(b)(1)(B), IC 6-2.5-5-21(b)(1)(C), or IC 6-2.5-5-21(b)(1)(D) is exempt from complying with the requirements of this rule.**

**(l) This section does not prohibit an exempted organization from waiving the exemption and using a certified food handler.**  
*(Indiana State Department of Health; 410 IAC 7-22-15; filed May 19, 2003, 8:50 a.m.: 26 IR 3336)*

### ***Notice of Public Hearing***

*Under IC 4-22-2-24, notice is hereby given that on June 27, 2006 at 1:30 p.m., at the Indiana State Department of Health, 2 North Meridian Street, Myers Conference Room, Indianapolis, Indiana the Indiana State Department of Health will hold a public hearing on a proposed amendment to 410 IAC 7-22-15 to establish standards for the certification of food handlers for food establishments and the imposition of penalties for violations.*

*These rules are amended to meet the changes made to IC 16-42-5.2 by the Indiana General Assembly.*

*Copies of these rules are now on file at the Health Care Regulatory Services Commission at the Indiana State Department of Health, 2 North Meridian Street and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.*

Sue Uhl  
 Deputy State Health Commissioner  
 Indiana State Department of Health