



Updated 4-7-08

# 2005 Food Code – Food Law

## Questions and Answers

### Ready-to-Eat Food/Date Marking (1-201.10 / 3-501.17)

#### What is date marking?

Date marking is a means of controlling the growth of *Listeria monocytogenes*, a bacteria that continues to grow even at refrigerated temperatures. Date marking is a process that assures the food is discarded before these bacteria can cause foodborne illness.

You must date mark any food that meets all three of the following criteria:

- Potentially Hazardous Food (PHF)/Time-Temperature Controlled for Safety (TCS) foods requiring time and temperature control to limit the pathogen growth or toxin formation.
- Ready-to-eat foods that may be eaten without any additional preparation steps to make food safe.
- Foods stored under refrigeration for more than 24 hours.

#### Do all PHF/TCS\* foods that are cooked and cooled in the establishment; require date marking unless specifically exempted?

Yes, the Food Code requires all refrigerated, ready-to-eat, PHF/TCS\* foods held more than 24 hours to be date marked.

**NOTE:** Some foods that are not fully cooked are offered on menus. Examples include: caesar salad dressing and tiramisu (an italian dessert), both made with raw, unpasteurized eggs. These foods are listed on the menu with a consumer advisory to warn the public that the foods are not fully cooked, so these foods would be considered to be in “ready-to-eat” form, and must be date marked.

#### Are commercially prepared fruit salads containing melons subject to date marking?

Yes, sliced melon is considered a PHF/TCS food. So if held more than 24 hours, it would require date marking.

#### Would all foods which could be eaten in their current form, despite the fact that they are routinely heated, require date marking? Specifically, would large containers of pizza toppings and other items that could be consumed in their ready-to-eat form without a safety concern be required to be date marked?

Yes. All refrigerated, ready-to-eat, PHF/TCS foods held more than 24 hours must be date marked, even large storage containers of pizza toppings, if they would not be used up within 24 hours.

#### Do restaurant doggie bags or carry out food packages need labeling and dating?

No. Doggie bags or carry out food packages have always been considered to be food for immediate service.

#### What is the proper timeline for dating sliced lunchmeats from the deli?

The day the package is opened is counted as day one, and the lunchmeat may be held for a maximum of seven days at 41° F.

If lunchmeat is not labeled “keep refrigerated” they do not require date marking. Examples are:

- Shelf-stable dry fermented sausages such as pepperoni and genoa salami, and
- Shelf-stable salt-cured products such as prosciutto and parma ham.

### **What about cheese sliced or cut upon request?**

Yes. Cheese sliced requires date marking, unless exempted. (See the “Date Marking Guide for Food Establishments” fact sheet for a list of exempted cheeses.)

### **Does milk need to be date marked?**

Yes. If the opened milk container is held more than 24 hours, it needs to be date marked.

## **Bare Hand Contact With Ready-to-eat Foods (3-301.11)**

### **Is bare hand contact prohibited with all ready-to-eat foods?**

Bare hand contact would not be a violation if PHF/TCS foods such as sausage toppings that are fully cooked are placed on raw dough since baking the pizza would entail going through a kill step. If a fully cooked pizza crust is used, and the pizza is just heated (i.e. to 120° F) to melt the cheese, then bare hand contact would not be allowed since a kill step will not occur.

## **Plumbing**

### **Referring to section 5-203.15, do you know if the required backflow protection devices are equipped with a screen?**

The 2005 Food Code (Section 5-203.15, Backflow Prevention Device, Carbonator), requires a double check valve with intermediate vent preceded by a screen of not less than 100 mesh to 25.4 mm (100 mesh to one inch) shall be installed upstream from a carbonating device and downstream from any copper in the water supply line if an air gap is not provided as specified under section 5-202.13.

According to the manufacturers and distributors of carbonated beverage equipment, the Procon pump has an internal 100 mesh screen that meets the requirement. When the ASSE 1022 backflow device is installed on the outlet side of this pump, it is protected by the Procon pump’s internal screen.

If they are not using a Procon pump on the carbonator, there are three ASSE 1022 devices with built-in 100 mesh screens. These devices may be installed on the outlet or inlet side of the pump:

- WATTS SD3
- Appollo CBBP series
- Wilkins model 740

### **There is a violation for drain lines on ice bins and ice machines in the Food Law (289.6125). Should all drain line violations be cited under this category?**

The food law addresses a very specific situation where waste lines are connected to other waste lines. It is seldom cited, but if it is an issue, please refer to the Food Law.

## **Exclusion / Restriction**

### **Referring to section 8-501.3, will there be any guidance provided regarding correct wording, specifically HIPPA compliance, when utilizing this section of the code to restrict or exclude an employee.**

Yes. The 2005 Food Code has updated documents in regards to exclusions and restrictions, which also lists Norovirus. See Annex 7 in the Food Code or online at: <http://www.cfsan.fda.gov/~acrobat/fc05-a7.pdf>

The privacy rule contained in HIPPA permits the use and disclosure of protected health information **only** in certain circumstances, one of which is public health activities. These activities may include disclosing the information to employers, regarding employees, when requested by employers, for information concerning a work related illness or injury or workplace related medical surveillance, because the employer must comply with a state law (Food Code).

## Licensing

### **Section 4105 of the law exempts ice cream trucks from licensure. Are vending machines that serve frozen ice cream treats still licensable?**

Yes. Section 4105(h) describes a "...mobile food establishment, such as an ice cream truck..." as exempt from licensing. It does not include ice cream vending machines.

### **When would a violation be cited using Food Law section 289.4103? This requires application for a license at least 30 calendar days prior to licensure. It now appears to us that it needs to be documented as a violation. Is that correct?**

No. The requirement is for the applicant. It does not specify any action that must be taken by the regulatory authority. MDA encourages local health departments to work with applicants to make timely license applications, and consider increased fees or fines for late applications.

### **Are food sampling booths at trade shows exempt from licensing? If so, please indicate section in the Food Law.**

The Food Law only allows an exemption for a non-profit trade association show that is not open to the general public (Food Law 289.4105 (1)(i)).

## **Potentially Hazardous / Time-temperature Controlled For Safety Food**

### **What is Potentially Hazardous/Time-Temperature Control for Safety Food?**

A potentially hazardous food requires time and temperature control for safety. These foods must be kept at 135° F or above or 41° F or below. (If the food is ready-to-eat, and stored at 41° F or below for more than 24 hours, it must be date marked.) The 2005 Food Code has two methods to determine if food requires time and temperature control for safety.

The first method uses the "short list." All foods on the short list (raw animal foods, heat treated animal foods and plant food, raw seed sprouts, cut melons, and garlic and oil mixtures that have not been modified in some way to prevent the growth of pathogens or formation of toxins) need to be kept hot or cold.

The second method uses a scientific approach. By looking at the pH, water activity, or a combination of both, the operator decides if the food needs time and temperature control for safety. See "Definitions for Potentially Hazardous Food" in Chapter 1 of the 2005 Food Code and information in Annex 3: <http://www.cfsan.fda.gov/~acrobat/fc05-a3.pdf>

### **The supplement to the 2005 Food Code lists sliced tomatoes as a PHF/ TCS food, and the recent edition of the Michigan Food Law of 2000, Act 92 of 2000, as amended, did not adopt the supplement. Should we tell operators all tomatoes are PHF/TCS foods?**

Yes, although the supplement to the 2005 Food Code was not adopted, current scientific evidence demonstrates that sliced tomatoes are PHF/TCS.

### **Are other cut vegetables potentially hazardous?**

It depends. Heat treated cut vegetables are PHF/TCS.

### **Is independent laboratory data needed for the pH and water activity of food products when evaluating to determine if temperature control is needed?**

This is a complex and evolving area. MDA staff should contact their supervisor and local health departments should contact their MDA food service consultant on a case by case basis.

**The code still makes reference to both 41° and 45°. Is there a section of the law that specifically states that Michigan is 41° F?**

Yes. The Food Law (289.6101 (1) (b)) strikes section 3-501.16 (A)(2) which had allowed 45° F for five years.

## **Using The Food Law and Code Of Federal Regulations (CFRs)**

**There are now critical, non-critical, and swing violations within the new Food Law and CFRs. As a result, is there an expectation that local health department sanitarians include these violations in their reports utilizing a three-part write up as is required for Food Code violations?**

Yes. Citing sections of the Food Law during routine food evaluations has not historically been a common local health practice. Certain Food Law sections however are necessary to cite and should be cited as needed, using your agency's standard citation writing format.

### **2105 through 2111- Seizure, Sampling and Destruction of Food**

While documenting voluntary removal and destruction of food found in violation of the law is effective, utilizing the Food Laws' formal seizure authority is often necessary and more appropriate. Seizing food assures legal control is maintained over the product, provides thorough documentation of the action, and often the establishment with a formal record for insurance purposes. Especially during recall effectiveness checks, the ability to formally seize recalled product still in commerce is critical.

MDA plans to provide specific guidance and model seizure forms for local health use.

### **2113, 2121, 2123- Order to Cease Operations, License Limitation**

These sections should be cited as appropriate during enforcement.

### **2129- Manager Certification**

Once the manager certification requirement becomes effective in July 2009, this section should be used when citing non-compliance. Rules to supplement the law and additional implementation guidance are currently being developed. Citing a particular rule section may also be appropriate.

### **5101- Prohibited Acts**

This section contains a number of prohibited acts that can be cited alone or in addition to specific Food Code sections. Examples include subsections:

- a-c: adulterated or misbranded food
- d: selling food without a license
- j: false labeling
- k: insanitary conditions

### **6140- Milk and Milk Products**

This section should be cited when appropriate, such as when raw eggs are used to make ice cream or when unsafe additives are added to a milk product.

### **6141- Anti-choking Poster Display**

This section should be cited when the necessary poster is not displayed.

### **6149- Consumer Advisory**

The Food Law now gives establishments the option of complying with 2005 Food Code section 3-603.11, or complying with another menu advisory option described in Food Law section 6149. Cite the applicable section, based upon which option the establishment has chosen.

**Chapter 8:** Contains numerous citable sections relating to labeling and advertising.

## Other Regulations

Various CFR sections as well as the Smoked Fish Rules may be cited, as applicable, when your agency is involved in reviewing processing operations within a food service establishment. Please contact your food service consultant for guidance.

\*MDA has made recommendations whether these sections should be cited as critical or non-critical in the excel spreadsheet containing the code language, recently provided to local health departments. MDA recommends allowing the same correction time frames for critical/non-critical food law violations as currently allowed for Food Code violations, including repeat, chronic and recurring violations.

### Should repeat and recurring violations from the Food Law and CFRs be treated the same as they are in the Food Code?

Yes.

### Why was 289.2111(3) added dealing with photos and trade secrets?

Section 2111(3) was added to the Food Law and states: "The director may take photographs or copy records as part of an evaluation. When a food establishment identifies by written document or mark that a certain area or record contains visible trade secrets, the director shall identify any photographs of that area or record as being confidential and shall diligently protect the confidentiality."

Michigan's Freedom of Information Act (FOIA) (PA 442 of 1976), states: Sec. 13 (1) A public body may exempt from disclosure as a public record under this act any of the following: ...

(d) Records or information specifically described and exempted from disclosure by statute.

The main two points relating to the handling of trade secret information is:

- Not obtain trade secret information unless necessary.
- Once obtained, immediately and specifically identify it as a trade secret exempt from FOIA. MDA recommends having such an identifying document signed by the Director or Health Officer.

Store and handle such material in a manner minimizing accidental dissemination.

## Follow-up Evaluations

### Will the time frame for completing corrections cited as Food Law violations be the same as Food Code violations?

Yes.

### Please explain the changes allowed for follow up evaluations.

The Food Law, section 6129(3), now requires critical violation corrections be confirmed, but does not necessarily require a follow-up visit. Although MDA still recommends follow-up inspections be made, this change was made to allow agencies flexibility to use resources wisely. MDA recommends agencies develop their own specific policies. The extent to which an agency uses this option, and the adequacy of submitted documents will not be part of the accreditation review process

Whether a correction is confirmed by a visit or in some other manner, normal follow-up documentation on approved forms must be completed and a copy provided to the establishment operator. Documentation should be clear regarding correction confirmation (i.e. specific photo, type of document, phone call and date received) and report delivery method (i.e. mailed, faxed, e-mailed). When not delivered in person during an on-site visit, a person-in-charge (PIC) signature is not needed on the evaluation report.

The following example of a comment made on a follow-up evaluation reviewed in-office might be as follows. **Violation corrected by (insert details) as shown in photo submitted by PIC on 3/24/08. No on-site visit made. Report mailed to establishment.**

## Manager Certification

**If a facility fails to provide a “certified” manager during a routine inspection, is this a critical or non-critical violation? Which violation number would be cited? Are seasonal facilities, limited food service operations (ice cream parlors, school feeding sites) and bars (only) exempt from having a “certified” manager-on-duty?**

The Manager Certification Workgroup is still developing rules and regulations and will address these issues.

**If a certified manager was not provided in the facility, what would be the corrective action?**

The Manager Certification Workgroup is still developing rules, and will address this issue.

## Consumer Advisory

**The consumer advisory requirements are found in the Food Law and the Food Code. If the Food Law supersedes the Food Code should we assume the violation should be cited from the Food Law and not the Food Code?**

The Food Law now gives establishments the option of complying with the 2005 Food Code (section 3-603.11), or complying with another menu advisory option described in the Food Law (section 6149). Cite the applicable document and section, based upon which option the establishment has chosen.

**Is the previous way the consumer advisory reminder/disclosure statement is printed on menus still acceptable under the new Code?**

If the consumer advisory meets the requirements of the 2005 FDA Food Code, the menus would not need to be changed.

For menus not meeting the requirements of the 2005 Code, or the Food Law as amended (but were approved and printed under the previous Food Code and Law) we recommend allowing them until the next menu is printed.

The placard on the wall is no longer acceptable.

## Cooling

**Is cooling a two-step process, or six hours cumulative? Please clarify.**

Food Code section 3-501.14 requires ... Within two hours from 135° F to 70° F...AND...within a total of six hours to 41° degrees. So it is a two step process, with a six hour cumulative time limit.

## Shellstock

**Do properly labeled bags of clams on the half shell labels have to be kept on file for 90 days after the bag is empty?**

Yes, as long as the shellfish (shucked or otherwise) is fresh or has not been cooked. Tags or informational portions of the bags should be kept for tracking in case of a foodborne illness.

**Are shellstock tags kept for 90 days from the date of harvest? OR 90 days from the receive date by the Food Service Operator?**

Food Code 3-203.12(B) requires “...retaining tags or labels for 90 calendar days from the date of harvest.”

**Which “raw seed sprouts” are prohibited for service to highly susceptible population under 2005 Food Code Section 3-801.11?**

The dictionary defines edible seed sprouts as a sprout form of amaranth, arugula, alfalfa, azuki bean, barley grass, broccoli, buckwheat, clover, garden cress, dill, fenugreek, lentils, lettuce, milk thistle, mizuna, mung bean, mustard, pea, quinoa, radish, soybean, sunflower, tatsoi, wheat grass, and kamut.

The American Journal of Epidemiology mentions outbreaks involving sprouts grown from alfalfa, radish, cress seeds and mung beans; and mixtures of alfalfa, radish, soy, mustard, and clover seeds.

### **A hospital called and asked if they could specifically serve raw broccoli sprouts (flowerets) in a salad to hospital patients?**

Broccoli flowerets are the young flowering stems on the broccoli plant and not considered sprouts. Sprouts are the new growth from a germinating seed. Clarify with the hospital if the item in question is a sprout or a floweret. If the food is a sprout, it may not be served to a highly susceptible population such as hospital patients.

### **Time As a Public Health Control (See MDA Fact Sheet “Time As a Public Health Control”)**

#### **Violation 3-501.19 (Time as a Public Health Control) does not state how often temperatures are to be taken. Please clarify.**

If time as a public health control is used, a facility must have written procedures the regulator can review during an evaluation. Two options are now available:

1. A facility can allow potentially hazardous ready-to-eat (hot or cold) foods to be stored without temperature controls for up to **four hours**, after which the food **must be discarded or immediately consumed. No food may be reused.** Monitoring of temperature is not required for this procedure; **or**
2. For holding cold foods ONLY, a facility can develop a procedure to hold the food for six hours using the following criteria:
  - The internal food temperature must be at or below 41° F at the beginning of this holding period (monitoring).
  - The foods must maintain internal temperature of 41-70° F (Monitoring).
  - The food must be marked with the time it is removed from temperature control, and the time it must be discarded.
  - If it is found to be over 70° F, it must be discarded immediately (monitoring), and
  - **When removed from service, it must be discarded or immediately consumed. No food may be reused.**

The policy should clarify how often temperatures would be taken, and the regulator will have to use professional and scientific judgment to determine if the policy and procedures are acceptable. PHF/TCS food held on a cook line across from the grill where the temperature is usually over 80° F might require different controls than food served at a satellite school cafeteria over a time period of one hour, and then discarded.

## **Employee Forms**

### **Will there be “New Employee Reporting Agreement” forms with Norovirus included? Also, will the “Food Employee Health Fact Sheets” now include the Big Five?**

Yes. Revised “Employee Reporting Forms” and Fact Sheets from the 2005 FDA Food Code are posted on the MDA Web under Laws, Regulations, and Fact Sheets on the “Resource For Regulators” page, or can be found at: <http://www.cfsan.fda.gov/~acrobat/fc05-a7.pdf>.

## Labeling

### **Do the prepackaged foods bought and re-sold by mobile establishments require labeling?**

Labels for packaged foods sold by mobile establishments are evaluated on a case-by-case basis and can be a very complex issue. There are many factors determining when a full label is required, and every firm may vary in their operation, so there is no single simple answer.

Labeling may not always be required, but is recommended to a firm as a best practice to aid them in:

- rotating food product,
- conducting tracebacks for recalls and foodborne illness outbreaks where different lots of products are co-mingled, and
- assisting the consumer with allergen issues.

MDA staff should contact their regional labeling specialist, and local health department staff should contact their MDA food service consultant if questions arise.

### **Is MDA willing to print posters containing allergen information? When can we expect educational materials to arrive from MDA?**

Yes, this is currently in the planning stage. Food Safety Education Grant money may provide funding for this project. A fact sheet from FDA is available at: <http://www.cfsan.fda.gov/~acrobat/ffalrqn.pdf>.

### **Is MDA working with the Michigan Environmental Health Association (MEHA) to update the food section of the Ready Reference?**

Yes, Sean Dunleavy is chairing the Ready Reference Committee for MEHA.

### **\* Potentially Hazardous Foods (PHF) Time-Temperature Controlled for Safety Food (TCS)**