Talking Points

902 KAR 45:180

Food Manufacturing

September 10, 2020

The shift to permitting food processors (aka manufacturers) by the risk level of the commodity being processed will bring the food manufacturing program in line with how the federal Food and Drug Administration classifies manufactured or processed foods.  The current administrative regulation for food processing, 902 KAR 45:160, outlines the inspection frequency based on risk category and the permitting process is being updated to this standard.

KRS 217.125 (2) gives the secretary of CHFS authority to promulgate administrative regulations to establish a fee schedule not to exceed costs of the program to the cabinet. The current costs to operate this program exceeds the fees collected by approximately $700,000.

The department has received over 400 comments on the proposed regulation with the most frequent concern being related to the increase in fee amounts. It is difficult to compare the old fee structure, which is based on square footage of the facility, with the new fee structure, which is based on the risk of the food produced or stored. Each individual manufacturer or storage warehouse is in a different situation based on the product they produce or store and the square footage of their facility, making it impossible to make broad statements about the percentage of fee increases.

However, based on the comments received to date and the concern over the fee increases, DPH will be amending the fee structure to be more fair and equitable to smaller producers.  The food manufacturers will still be classified by risk but the fee will be based on total gross sales income.  It will be filed with LRC by October 15th.

Below is the suggested revision to the fee structure.   A manufacturer who may currently be paying a $120 fee may only be assessed a $400 fee with this suggested fee structure.  Given the regulation promulgation timeline and the existing permitting process (by statute permits are renewed in December), manufacturers will not be impacted until December 2021 for the 2022 Calendar year.

Income <$100,000                                            Risk level 1          Fee: $400

                                                                              Risk level 2          Fee: $300

                                                                              Risk level 3          Fee: $200

Income >$100,000 - <$1,000,000                  Risk level 1          Fee: $1,200

                                                                              Risk level 2          Fee: $750

                                                                              Risk level 3          Fee $450

Income >$1,000,000                                         Risk level 1          Fee: $2,800

                                                                              Risk level 2          Fee: $1,500

                                                                              Risk level 3          Fee: $1,000

This fee does not impact entities permitted as a Home-based Processor or Microprocessor in KRS 217.136 and regulated under 902 KAR 45:090. By definition, a home-based processor produces or processes non-potentially hazardous foods, and is limited to sells from the home, at a market, roadside stand, community event, or online. A home-based mircorprocessor is a farmer who produces or processes foods, including but not limited to acid foods, formulated acid food products, acidified food products, or low-acid canned foods, and is limited to sells at farmers markets, certified roadside stands, or from the microprocessor’s farm.

There are two main differences between a food-processing establishment and a home-based microprocessor:

* A food processing establishment can sell items in a retail setting, on a national or even international setting; and
* A food processing establishment does not have to grow the primary ingredient

By definition in KRS 217.015 (20), a food-processing establishment does not include a retail setting, a home-based processor, or a home-based microprocessor.

A high-risk food manufacturer or storage facility is one that is engaged in international, interstate, statewide, or regional distribution; and uses one (1) or all of the following manufacturing processes:

* Time and temperature controlled foods that are ready-to-eat;
* High risk foods that are considered ready-to-eat; or
* Food that require specialized processes to decrease the risk potential.

Examples of High Risk Manufacturers (Risk Level 1) include the following products:

* Low Acid Canned Foods (LACFs)
* Acidified Foods (AFs)
* Juice products where a Juice Hazard Analysis Critical Control Point (HACCP) plan is required
* Seafood products where a Seafood HACCP plan is required
* Seed sprouts
* Sandwich processors
* Salad processors
* Ready To Eat produce in a raw, refrigerated or frozen state
* Peanut butter
* Rabbit or other non-amenable species
* Repackaging Potentially Hazardous Foods (PHFs)
* Other Ready To Eat (RTE) PHFs not listed above including certain bakery products or
* Wholesale salvage food processors

Medium risk foods are either ready-to-eat foods or potentially hazardous foods, but not both.

Medium Risk Manufacturers (Risk Level 2) include the following products:

* Confectionaries
* Snack food processors or re-packers – potato chips, pretzels, nuts, etc.
* Bottled water
* Carbonated beverage and other drink manufacturers (beverages containing less than 100% juice)
* Repackaged foods from Food Banks
* Cereals
* Acid Foods
* Beer Cheese
* Most Jams and Jellies
* Sugar and sorghum
* Non-exempt honey
* Maple syrup
* Ice
* Baked goods
* Repackages or blended edible oils
* Repackages non-PHF
* Dry blending
* Other foods that are not time/temperature controlled and ready to eat, and time/temperature controlled foods that are not RTE

Low risk food are those that are not time and temperature controlled.

Low Risk Manufacturers (Risk Level 3) include the following:

* Milling plants
* Malting plants
* Grain elevators
* Coffee or tea (dry) packaging
* Food warehouses with refrigerated or frozen storage of products not requiring a Seafood HACCP plan
* Produce warehouses that do not process
* Ambient storage warehouses
* Food Banks that do not process food
* Cosmetics
* Other processors of foods not time/temperature controlled