

**DEPARTMENT OF HEALTH AND MENTAL HYGIENE
COMMISSIONER OF HEALTH AND MENTAL HYGIENE**

**NOTICE OF ADOPTION OF AN AMENDMENT TO
TITLE 24 OF THE RULES OF THE CITY OF NEW YORK ADDING CHAPTER
23 (“FOOD SERVICE ESTABLISHMENT INSPECTION PROCEDURES”)**

IN COMPLIANCE WITH SECTION 1043(a) OF THE NEW YORK CITY CHARTER NOTICE OF INTENTION TO AMEND THESE RULES AND NOTICE OF PUBLIC HEARING WAS PUBLISHED IN THE CITY RECORD ON DECEMBER 13, 2004.

A public hearing was held on January 13, 2005. Written comments were submitted by 21 persons. Nineteen persons testified at the hearing. After a review of the written comments and testimony, changes were made in the Appendices to the rule and the rule was adopted on February 14, 2005.

Statutory Authority

Amendment of Title 24 of the Rules of the City of New York is authorized by §§389(b) and 1043(a) of the New York City Charter (the “Charter”). Charter §389(b) provides that “heads of mayoral agencies shall have the power to adopt rules to carry out the powers and duties delegated to the agency head or the agency by or pursuant to federal, state or local law.” Charter §1043(a) authorizes each agency to “adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law.”

Statement of Basis and Purpose

These rules incorporate inspection evaluation procedures used by the New York City Department of Health and Mental Hygiene (“DOHMH” or the “Department”) Bureau of Food Safety and Community Sanitation (“BFSCS”) in conducting food service establishment (“FSE”) and non-retail processing establishment inspections, as those terms are defined in §81.03 of the New York City Health Code (the “Health Code”), but do not apply to inspections by BFSCS of mobile food vending units, or to its inspections of FSE’s to determine compliance with the New York City Smoke-Free Air Act (Chapter 5, Title 17 of the Administrative Code of the City of New York).

In March 2003, in an attempt to reduce the incidence of food borne illness in New York City, particularly that occurring outside the home, the Department revised its inspection evaluation procedures. At the time, the Department reviewed results of studies conducted by the US Centers for Disease Control and Prevention (“CDC”). Such studies show that while most food borne illness results in several days of gastroenteritis with symptoms of abdominal pain, vomiting, diarrhea and fever, the impact to the United States economy is tremendous, costing over \$6.5 billion a year. More importantly, for some, infections caused by bacteria such as Salmonella or Listeria, after eating contaminated food, can be fatal. The CDC estimates that each year in the United States more than 75 million people become ill after eating improperly handled or prepared food; 320,000 of these individuals require hospitalization and over 5,000 die from food borne illness. DOHMH receives more than 4,000 reports annually of bacteria and viruses that cause food borne illness in New Yorkers. The best current scientific knowledge is that about half of

food borne illness results from exposures outside of the home. In order to better protect the public's health DOHMH revised its restaurant inspection evaluation tool to more accurately reflect the overall safety of establishments and to facilitate further reductions in the risk of food borne illness when New Yorkers eat out.

The new rule provides that results of FSE inspections be expressed as a "score," using a point system. Although inspection procedures will remain essentially the same as they have been for at least the past 20 years, scoring the results of such inspections will better reflect the overall sanitary condition of FSE's and provide a more objective method of evaluating the public health risks presented by the operation of any particular FSE. DOHMH Public Health Sanitarians will continue to conduct a "critical control point" (CCP) inspection, a methodology recommended by the US Food and Drug Administration (FDA) for preventing food safety hazards or food borne illnesses from occurring. The rationale for the scoring system is consistent with current public health food safety trends and federal recommendations. See, e.g., US FDA *Food Code* (2001); *Report of the FDA Retail Food Program Database of Food Borne Illness Risk Factors* (August 10, 2000). A point value will be assessed for *each* violation. A total of 28 or more points in critical and/or general violations will be considered a "failed" inspection, which requires a compliance inspection by the DOHMH. Each violation will be assigned a base point value, with additional points added to a violation, as necessary, to reflect increasing severity or magnitude of the violation. The severity or magnitude measurement factor is called a "*Condition*." The more severe or pervasive the violation, the greater the point value for that violation.

Public Health Risk Factors

The scoring system weights the points assessed for different categories of violations to reflect "risk factors" for food borne illnesses that have been identified in studies conducted by the federal Centers for Disease Control and Prevention (CDC). These risk factors have been determined to be the leading causes of food borne illness. A food service manager's knowledge of food safety principles is key to reducing illnesses caused by food. These risk factors are:

- Improper personal hygiene practices.
- Improper handwashing and bare hand contact with ready to eat foods.
- Improper cooking and holding temperatures.
- Food from an unapproved source.
- Cross contamination of food and food equipment.

The scoring system is designed to give food service operators a clearer understanding of what they must do to prevent disease and guide them in complying with the laws and rules that govern operation of an FSE in New York City. Table 1 in §23-06 summarizes the number of points that are assigned for a violation, and accounts for the severity of violations ("Conditions").

Most CDC "risk factors" are referred to as *Public Health Hazards (PHH)* by the DOHMH. These are violations that are known to contribute directly to food borne illness. *PHHs* are marked with an asterisk (*) on the *Inspection Work Sheet*, included in the rule as Appendix A of Chapter 23. Because of the risks these *Public Health Hazards* pose, they are assigned a greater initial point value than that assigned to other critical violations. *Public Health Hazards* must be corrected at the time of the inspection or the establishment may be ordered closed, in accordance with §23-06(b) of the rule and §81.39 of the Health Code. *Pre-Permit Serious Items* (identified with a "+" on the *Inspection Work Sheet*) must be corrected prior to approval for issuance of a new permit.

Critical violations continue to occur in large numbers in New York City, although the data show that things are improving. Between April, 2003 (when the scoring system was initiated) and

October, 2004, among the most commonly cited critical violations associated with risk factors for food borne illness was cross-contamination of food and food equipment, a violation which was cited on a significant percentage of food services establishment inspections. Other risk factors, such as improper personal hygiene practices of food workers, and improper handwashing and bare hand contact with ready-to-eat foods, were also common violations cited during this period. However, the Department's data show that in the year following implementation of the scoring system, the average number of all critical violations decreased significantly.

Conditions

Evaluating the severity of a violation and considering critical and individual general violations as part of the overall score offer a clearer picture of the sanitary condition of the establishment. The scoring system enables the DOHMH to monitor, report and deal with increases in the incidence and severity of violations at a food service establishment, and better prevent the occurrence of public health hazards. *Condition* levels provide the DOHMH and the FSE operator with a clearer picture of the overall sanitary condition of an establishment

Determining the Score for an Inspection

Using Appendix B of chapter 23 as a guide, the Department inspector will assign a numeric point value to each violation. The point value signifies the seriousness of each violation. In other words, the higher the condition number, the more serious the violation. *Conditions* range from *Condition I*, the least serious condition with the lowest point value, through *Condition IV*, the most serious condition with the highest point value. *Condition V* violations, in most instances, are reserved for a failure to correct any Public Health Hazard condition noted by the health inspector at the time of the inspection. When a *Condition V* violation is assigned 28 points, it is considered an automatic failure of the inspection. The DOHMH will schedule a compliance inspection following any failed inspection to determine if a food service establishment has made the necessary corrections to comply with the Health Code or other applicable law, and is operating in a sufficiently safe manner. A compliance inspection is a full sanitary inspection performed in the same way as an initial inspection.

Issuing Notices of Violation

On a full sanitary inspection, the DOHMH will issue a "notice of violation" when an FSE has one or more critical violations and/or more than 14 points of accumulated general violations. General violations are cited individually on the written report or notice of violation to encourage food service operators to better understand and correct less serious violations, as well as those that are more serious. A notice of violation will not be issued when an establishment has no critical violations, and has accumulated 14 or fewer general violation points on a full sanitary inspection. However, a notice of violation may be issued after a partial inspection conducted in response to a complaint, where the complaint is substantiated.

Response to public comment

The Department has reviewed the comments received and has made changes in the appendices with respect to the following violation categories:

Canned foods. If cans are only severely dented, the violation will be considered general (9A). If cans are swollen, leaking, or rusted, the violation will continue to be considered a critical violation (3D).

Milk products. Milk and milk products found past their stamped expiration date, in violation of Health Code §111.33, if being served or held for service in an FSE, will be considered a general violation (9B).

Thawing procedures. Improper thawing of frozen foods has been downgraded to a general violation (9C).

Facilities for washing, rinsing, and sanitizing dishes and utensils. Failure to install such facilities will be considered a pre-permit violation (5I+). However, lack of test kits, immersion baskets, or failure to maintain adequate concentration of sanitizing solution, and similar violations, will be downgraded to a general violation (see, e.g., 10K).

Food contact surfaces. Failure to clean and sanitize food preparation surfaces such as cutting boards after use where possible contamination may occur will continue to be considered a critical violation (6D). However, discolored, pitted, scratched, or deeply grooved cutting boards will be cited as a general violation (9D).

In addition, the category previously designated as “6H Other” at the end of the listing of critical violations in Appendix A, has been retitled “Other Criticals” and for statistical purposes is broken down into subcategories (7A through 7F).

The statement regarding the Scope of the Rules in §23-01 has been modified to indicate that the inspection procedures do not apply to inspections conducted to determine compliance with the New York City Smoke-Free Air Act.

Statement pursuant to Charter §1042 – Regulatory Agenda

This rule was not included in the Department’s FY 2005 Regulatory Agenda because the need for such rule was not known at that time.

THE RULE IS AS FOLLOWS:

Note - Matter to be deleted is in [brackets]

Matter underlined is new

Section 1. Title 24 of the Rules of the City of New York, is amended by adding a new Chapter 23 entitled “Food Service Establishment Inspection Procedures.”

CHAPTER 23

FOOD SERVICE ESTABLISHMENT INSPECTION PROCEDURES

§23-01. Introduction and scope

§23-02 Definitions and construction of words and terms

§23-03. Conduct of inspections

§23-04. Failure of inspections

§23-05. Revocation or suspension of permits

§23-06. Point values

§23-07 Violation Condition Level

§23-08. Issuance of notices of violations

§23-09 Effect of other laws and construction

Appendix A Food Service Establishment Inspection Score Worksheet

Appendix B Food Service Establishment Inspection Scoring Parameters – A Guide to Conditions

§23-01. Introduction and scope. These rules shall apply to the conduct of inspections of food service establishments and non-retail processing establishments, as those terms are defined in §81.03 of the New York City Health Code (“Health Code”), or successor rule, by employees of the Department of Health and Mental Hygiene (the “Department”), and the significance to be accorded such inspections by the Department in considering certain other enforcement actions. These rules shall not apply to inspections of mobile food vending units or to inspections conducted to determine compliance with the New York City Smoke-Free Air Act (§§17-501 et seq. of the Administrative Code of the City of New York). Nothing herein is intended to limit any authority that the Department may otherwise have to enforce the provisions of any applicable law.

§23-02 Definitions and construction of words and terms

Administrative Tribunal shall mean the Administrative Tribunal of the Department established in Article 7 of the Health Code.

Administrative violations are critical violations of the Health Code or other applicable law which are listed under “Administration” in Appendix 23A of these rules.

Commissioner shall mean the Commissioner of the Department of Health and Mental Hygiene.

Complaint inspection shall mean an inspection conducted in response to a complaint received by the Department that may be either a full sanitary inspection or an inspection limited in scope, as determined by the Department, depending upon the nature of the complaint and the date of the most recent full sanitary inspection conducted by the Department.

Compliance inspection. A reinspection conducted after an establishment has failed a prior inspection.

Condition level. Value (I, II, III, IV or V) based on the number, magnitude or pervasiveness of occurrences, or the seriousness of risk presented by a violation.

Critical violations are violations of the Health Code or other applicable law listed under the classification “critical violations” in Appendix 23-A of these rules and are relatively more likely than “general violations” to contribute to food contamination, illness, or environmental degradation and may represent a substantial risk to the public health.

Department shall mean the Department of Health and Mental Hygiene of the City of New York.

Food service establishment shall have the same meaning as the definition in §81.03 of the Health Code.

Full sanitary inspection shall mean a complete site review by the Department of all food-related operations, physical facilities and sanitary conditions at an establishment subject to a permit issued by the Commissioner to determine whether such establishment is operating in compliance with the Health Code and other applicable law.

General violations. All violations of the Health Code or other applicable law listed under the classification “general violations” in Appendix 23-A of this Chapter.

Initial inspection. A full sanitary inspection conducted by the Department, which may be the first of a possible series of inspections, to determine if an establishment is operating in compliance with applicable law.

Notice of violation shall have the same meaning as the definition of “finding of violation” in §7.05 of the Health Code.

Numeric point value. Numeric value assigned to a violation by the Department, based on the condition level of such violation.

Pre-permit inspection. An inspection conducted prior to operating and/or approval for issuance of a permit.

Pre-permit serious item is a violation, identified in Appendix 23-A of this Chapter by a plus (+) sign.

Public health hazards are critical violations known to contribute directly to food borne illness or disease, identified with an asterisk (*) in Appendix 23-A of this Chapter, and which include, but are not limited to, “imminent health hazards” defined in Article 81 of the Health Code and Part 14 of the State Sanitary Code.

§23-03. Conduct of inspections. In issuing notices of violation returnable to the Department’s Administrative Tribunal, the Department shall utilize the inspection scoring and evaluation procedures contained in this Chapter and in Appendices 23-A and 23-B.

§23-04. Failure of inspections. A score of 28 or more points determined by a Department inspector on any inspection shall, whenever practicable, result in a compliance inspection by the

Department and shall be deemed a “failure” of such inspection, regardless of whether a notice of violation issued by the Department as a result of such failed inspection has been adjudicated, and regardless of the results of such adjudication by the Administrative Tribunal.

§23-05. Revocation or suspension of permits. Failure to pass inspections, as demonstrated by uncorrected violations of the Health Code and other applicable law, and accumulation of 28 or more points on any initial or compliance inspection, may provide the basis for commencement of a proceeding to revoke or suspend a permit pursuant to §5.17 of the Health Code.

§23-06. Point values. (a) Each violation shall be assigned a point value related to condition in accordance with Appendix 23-A (Food Service Establishment Inspection Score Worksheet).

(b) Public Health Hazards. Failure to correct public health hazards, marked with an asterisk (*) in Appendix 23-A of this Chapter, found on any inspection, may result in an establishment being ordered closed by an authorized employee of the Department, pursuant to §81.39 of the Health Code.

(c) Pre-Permit Serious Items. Failure to correct pre-permit serious items, marked with a plus sign (+) in Appendix 23-A of this Chapter, on a pre-permit inspection may result in an establishment being denied issuance of a new permit, pursuant to §81.05 of the Health Code.

§23-07 Violation condition Level. (a) The condition level of every violation shall be determined utilizing Appendix 23-B (Food Service Establishment Inspection Scoring Parameters – A Guide to Conditions) of this Chapter as a guide.

(b) Using the scoring system in Appendix B , the Department inspector shall calculate a numeric point value for each violation.

(c) The point value shall signify the seriousness of each violation, and the higher the numeric value, the more serious the violation shall be considered by the Department.

(d) Condition levels shall range from Condition I, the least serious condition with the lowest point value, through Condition V, the most serious condition with the highest point value.

§23-08. Issuance of notices of violations. (a) The Department shall issue a notice of violation whenever a food service establishment has one or more critical violations, or has accumulated more than 14 points in general violations on a full sanitary inspection regardless of whether any critical violations are cited.

(b) All violations shall be cited individually on written inspection reports and notices of violation.

(c) The Department may also issue a notice of violation following any inspection which is not a full sanitary inspection, including, but not limited to, a complaint inspection, regardless of the category or number of violations found.

§23-09 Effect of other laws and construction.

(a) These rules shall be read and enforced in accordance with all applicable provisions of law, including, but not limited to, the State Public Health Law and Sanitary Code, the New York City Health Code, and Title 17 of the Administrative Code of the City of New York.

(b) No provision herein shall limit the authority of the Department to conduct such other inspections or take any other action it deems necessary, to enforce any provision of law within the jurisdiction of the Department.

(c) If any provision of this Chapter is adjudged invalid by any court of competent jurisdiction, such judgment shall not affect or impair the validity of the remainder of this Chapter.

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