

CHAPTER 617

S.B. No. 1421

AN ACT

relating to the regulation of food service establishments, retail food stores, mobile food units, and temporary food service establishments not regulated by counties or public health districts; providing penalties.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 437.001, Health and Safety Code, is amended to read as follows:
 Sec. 437.001. DEFINITIONS. In this chapter:

- (1) "Board" means the Texas Board of Health.
- (2) "Commissioner" means the commissioner of health.
- (3) "Department" means the Texas Department of Health.
- (4) "Food," ~~["food,"]~~ "food service establishment," "retail food store," "mobile food unit," ~~[and]~~ "roadside food vendor", and "temporary food service establishment" have the meanings assigned to those terms by rules adopted by the board ~~[Texas Board of Health]~~ under this chapter ~~[Chapter 431 (Texas Food, Drug, and Cosmetic Act)]~~.

SECTION 2. Chapter 437, Health and Safety Code, is amended by adding Sections 437.0055 and 437.0056 to read as follows:

Sec. 437.0055. PERMIT FROM DEPARTMENT REQUIRED IN AREAS NOT REGULATED BY COUNTY OR PUBLIC HEALTH DISTRICT. (a) A person may not operate a food service establishment, retail food store, mobile food unit, or temporary food service establishment located in an area in which a county or public health district does not require a permit or conduct inspections under this chapter unless the person has a permit issued by the department.

(b) A person required to obtain a permit under Subsection (a) must apply annually for the permit and must pay any fees required by the department.

Sec. 437.0056. RULEMAKING AUTHORITY. The board may adopt rules for the efficient enforcement of this chapter by the department in an area not regulated under this chapter by a county or public health district. The board by rule shall establish minimum standards for granting and maintaining a permit in an area not regulated under this chapter by a county or public health district. The commissioner may refuse an application for permit or suspend or revoke a permit in an area not regulated under this chapter by a county or public health district.

SECTION 3. Section 437.012, Health and Safety Code, is amended to read as follows:

Sec. 437.012. COUNTY AND PUBLIC HEALTH DISTRICT FEES. (a) A county or public health district may require the payment of a fee for issuing or renewing a permit.

(b) The fee charged by a county or public health district for issuing or renewing a permit may not exceed \$150 or the highest fee charged by a municipality in the county or public health district, whichever amount is less.

(c) Fees collected by a county under this chapter shall be deposited to the credit of a special fund of the county. Fees collected by a public health district under this chapter shall be deposited to the credit of a special fund created by the cooperative agreement under which the district operates.

(d) Fees deposited as provided by this section may be spent only for conducting inspections required by this chapter and issuing permits.

SECTION 4. Chapter 437, Health and Safety Code, is amended by adding Section 437.0125 to read as follows:

Sec. 437.0125. DEPARTMENT FEES. (a) The department shall collect fees for:

- (1) filing, renewing, or amending a permit; and
- (2) an inspection performed to enforce this chapter or a rule adopted under this chapter.

(b) The department may charge annual fees.

(c) The board by rule shall set the fees in amounts that allow the department to recover at least 50 percent of the annual expenditures by the department for:

- (1) reviewing and acting on a permit;
- (2) amending and renewing a permit;
- (3) inspecting a facility as provided by this chapter and rules adopted under this chapter; and

(4) implementing and enforcing this chapter, including a rule or order adopted or a license issued by the department.

(d) *The department shall spend not less than 50 percent of the permit fees collected to inspect facilities and to enforce and administer this chapter.*

(e) *All permit fees collected by the department under this chapter shall be deposited in the state treasury to the credit of the food and drug retail fee fund.*

SECTION 5. The section heading of Section 437.016, Health and Safety Code, is amended to read as follows:

Sec. 437.016. CRIMINAL PENALTY: VIOLATION OF COUNTY AND PUBLIC HEALTH DISTRICT PERMIT REQUIREMENTS.

SECTION 6. Chapter 437, Health and Safety Code, is amended by adding Sections 437.0165 and 437.018 to read as follows:

Sec. 437.0165. CRIMINAL PENALTY: VIOLATION OF DEPARTMENT PERMIT REQUIREMENT. (a) *A person commits an offense if the person operates a food service establishment, retail food store, mobile food unit, or temporary food service establishment without a permit that is required by the department under Section 437.0055.*

(b) *An offense under this section is a Class A misdemeanor.*

(c) *Each day on which a violation occurs constitutes a separate offense.*

Sec. 437.018. ADMINISTRATIVE PENALTY. (a) *The commissioner may impose an administrative penalty against a person who holds a permit or who is regulated under this chapter and who violates this chapter or a rule or order adopted under this chapter.*

(b) *The penalty for a violation may be in an amount not to exceed \$10,000. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.*

(c) *The amount of the penalty shall be based on:*

(1) *the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts, and the hazard or potential hazard created to the health, safety, or economic welfare of the public;*

(2) *the enforcement costs relating to the violation;*

(3) *the history of previous violations;*

(4) *the amount necessary to deter future violations;*

(5) *efforts to correct the violation; and*

(6) *any other matter that justice may require.*

(d) *If the commissioner determines that a violation has occurred, the commissioner shall issue an order that states the facts on which the determination is based, including an assessment of the penalty.*

(e) *Within 14 days after the date the order is issued, the commissioner shall give written notice of the order to the person. The notice may be given by certified mail. The notice must include a brief summary of the alleged violation and a statement of the amount of the recommended penalty and must inform the person that the person has a right to a hearing on the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.*

(f) *Within 20 days after the date the person receives the notice, the person in writing may accept the determination and recommended penalty of the commissioner or may make a written request for a hearing on the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.*

(g) *If the person accepts the determination and recommended penalty of the commissioner, the commissioner by order shall approve the determination and impose the recommended penalty.*

(h) *If the person requests a hearing or fails to respond timely to the notice, the commissioner shall set a hearing and give notice of the hearing to the person. An administrative law judge shall make findings of fact and conclusions of law and promptly issue to the commissioner a proposal for a decision about the occurrence of the violation and the amount of a proposed penalty. Based on the findings of fact, conclusions of law, and proposal for a decision, the commissioner by order may find that a violation has occurred and impose a penalty or may find that no violation occurred.*

(i) *The notice of the commissioner's order given to the person under the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes) must include a statement of the right of the person to judicial review of the order.*

(j) *Within 30 days after the date the board's order is final as provided by Section 16(c), Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes), the person shall:*

(1) *pay the amount of the penalty;*

(2) *pay the amount of the penalty and file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty; or*

(3) *without paying the amount of the penalty, file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.*

(k) *Within the 30-day period, a person who acts under Subsection (j)(3) of this section may:*

(1) *stay enforcement of the penalty by:*

(A) *paying the amount of the penalty to the court for placement in an escrow account;*
or

(B) *giving to the court a supersedeas bond that is approved by the court for the amount of the penalty and that is effective until all judicial review of the board's order is final; or*

(2) *request the court to stay enforcement of the penalty by:*

(A) *filing with the court a sworn affidavit of the person stating that the person is financially unable to pay the amount of the penalty and is financially unable to give the supersedeas bond; and*

(B) *giving a copy of the affidavit to the commissioner by certified mail.*

(l) *The commissioner on receipt of a copy of an affidavit under Subsection (k)(2) of this section may file with the court, within five days after the date the copy is received, a contest to the affidavit. The court shall hold a hearing on the facts alleged in the affidavit as soon as practicable and shall stay the enforcement of the penalty on finding that the alleged facts are true. The person who files an affidavit has the burden of proving that the person is financially unable to pay the amount of the penalty and to give a supersedeas bond.*

(m) *If the person does not pay the amount of the penalty and the enforcement of the penalty is not stayed, the commissioner may refer the matter to the attorney general for collection of the amount of the penalty.*

(n) *Judicial review of the order of the commissioner:*

(1) *is instituted by filing a petition as provided by Section 19, Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes); and*

(2) *is under the substantial evidence rule.*

(o) *If the court sustains the occurrence of the violation, the court may uphold or reduce the amount of the penalty and order the person to pay the full or reduced amount of the penalty. If the court does not sustain the occurrence of the violation, the court shall order that no penalty is owed.*

(p) *When the judgment of the court becomes final, the court shall proceed under this subsection. If the person paid the amount of the penalty and if that amount is reduced or is not upheld by the court, the court shall order that the appropriate amount plus accrued interest be remitted to the person. The rate of the interest is the rate charged on loans to depository institutions by the New York Federal Reserve Bank, and the interest shall be paid for the period beginning on the date the penalty was paid and ending on the date the penalty is remitted. If the person gave a supersedeas bond and if the amount of the penalty is not upheld by the court, the court shall order the release of the bond. If the person gave a supersedeas bond and if the amount of the penalty is reduced, the court shall order the release of the bond after the person pays the amount.*

(q) A penalty collected under this section shall be remitted to the comptroller for deposit in the general revenue fund.

(r) All proceedings under this section are subject to the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes).

SECTION 7. This Act takes effect September 1, 1993, except that Sections 2 and 6, to the extent they prohibit the operation of a food service establishment, retail food store, mobile food unit, or temporary food service establishment without a license from the Texas Department of Health, take effect January 1, 1994.

SECTION 8. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed the Senate on May 13, 1993, by a viva-voce vote; passed the House on May 26, 1993, by a non-record vote.

Approved June 13, 1993.

Effective Sept. 1, 1993, except §§ 2 and 6 effective Jan. 1, 1994, as provided in § 7.