

# Law Bulletin

OSU EXTENSION AGRICULTURAL &amp; RESOURCE LAW PROGRAM

January 2014

## Sampling Home-Based Food Products: Keeping You Responsible for a Safe Food Product

So far in a series of law bulletins, we've discussed how to sell your baked goods at farmer's markets, what's required for a home bakery license, and how to label and package your home-based food products. These law bulletins have all discussed the requirements for producing and selling food products as a cottage food producer and under a home bakery license in Ohio. We continue the series with a description of how food sampling is conducted by the Ohio Department of Agriculture (ODA) for these home-based food products.

One of the benefits of being a cottage food producer or obtaining a home bakery license is how few conditions there are to meet in order to sell your food product in Ohio because these foods have lower food safety risks than other food products. For example, if you want to sell cottage food products, you are not required to have your home kitchen inspected and you do not have to pay any type of licensing fee (since no license is required). If you want to sell food products under a home bakery license, your home kitchen must be inspected by the ODA and you will have to pay a \$10 license fee every year. For a more in depth explanation of cottage food products and home bakery licenses, see the posts mentioned above.

Even though there are lower risks and few requirements for selling home-based food products, you still have an obligation to ensure a safe food product. Compared to a restaurant, which could be inspected multiple times over the year, there is very little oversight when it comes to producing cottage food products and food products produced under a home bakery license. However, ODA does maintain some oversight in the form of food sampling.

### What is food sampling?

Food sampling is conducted to determine if a food product has been misbranded or adulterated.

### ***Misbranded Food***

Under Ohio Revised Code Section 3715.60, a food product is considered misbranded if:

1. Its labeling is false or misleading
2. It is offered for sale under the name of another food
3. Its container is made, formed, or filled to be misleading
4. It is an imitation of another food, *unless* its label contains, in type of uniform size and prominence, the word "imitation," and immediately thereafter the name of the food imitated
5. When it is in package form, it does not bear a label containing:
  - The name and place of the business of the producer

- An accurate statement of the quantity of the contents in terms of weight, measure, or numerical count (reasonable variations are permitted)
  - For cottage food products – if the label fails to contain any of the information required for a cottage food label (see Labeling post mentioned above)
6. Any word, statement, or other information required to appear on the label or labeling is not prominently placed with conspicuousness as compared with other words, statements, designs, or devices, in the labeling, and in such terms to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use
  7. It claims to be, or is represented as, a food for which a definition and standard of identity have been prescribed by statute or rule, *unless*:
    - It conforms to such definition and standard
    - Its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such statute or rules, the common names of optional ingredients, other than spices, flavoring, and coloring, present in such food.
  8. It claims to be or is represented as:
    - A food for which a standard of quality has been prescribed by rule in Section 3715.02 of the Revised Code and its quality falls below the standard *unless* its label bears, in the manner and form the rules specify, a statement that it falls below the standard;
    - A food for which a standard or standards of fill of container have been prescribed by rule in Section 3715.02 of the Revised Code, and it falls below the standard of fill of container applicable, *unless* its label bears, in the manner and form the rules specify, a statement that it falls below the standard.
  9. It is not subject to the provisions described above in section 7, *unless* it bears labeling clearly giving:
    - The common or usual name of the food, if any
    - In case it is fabricated from two or more ingredients, the common or usual name of each ingredient; except that spices, flavorings, and colorings, other than those sold as such, may be designated as spices, flavorings, and colorings, without naming each. However, if providing the common or usual name of each ingredient is impractical or results in deception or unfair competition, exemptions will be established by the Director of Agriculture.
  10. It purports to be or is represented to be for special dietary uses, *unless* its label contains the information concerning its vitamin, mineral, and other dietary properties to fully inform purchasers as to its value for such uses
  11. It bears or contains any artificial flavoring, artificial coloring, or chemical preservatives, *unless* the label states that fact

## **Adulterated Food**

Under Ohio Revised Code Section 3715.59, food is considered adulterated if any of the following apply to the food product:

1. It bears or contains any poisonous or deleterious substance that may render it injurious to health

2. It bears or contains any added poisonous or added deleterious substance that is unsafe
3. It consists in whole or in part of a diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food
4. It has been produced, processed, prepared, packed, or held under unsanitary conditions where it may have become contaminated with filth, or where it may have been rendered diseased, unwholesome, or injurious to health
5. It is the product of a diseased animal or an animal that has died otherwise than by slaughter, or an animal that has been fed upon the uncooked offal from a slaughterhouse
6. Its container is composed, in whole or in part, of any poisonous or deleterious substance that may render the contents injurious to health
7. Any valuable constituent has been, in whole or in part, omitted or abstracted from the food
8. Any substance has been substituted wholly or in part for the food
9. Damage or inferiority has been concealed in any manner
10. Any substance has been added to, mixed, or packed with the food to increase its bulk or weight, reduce its quality or strength, or make it appear better or of greater value than it is
11. It is confectionery and it bears or contains any alcohol or nonnutritive article or substance other than harmless coloring, harmless flavoring, harmless resinous glaze not in excess of four-tenths of one per cent, harmless natural wax not in excess of four-tenths of one per cent, harmless natural gum, or pectin, except this does *not* apply to any confectionery by reason of its containing less than one-half of one per cent by volume of alcohol derived solely from the use of flavoring extracts, or to any chewing gum by reason of its containing harmless nonnutritive masticatory substances
12. It bears or contains a coal-tar color other than one from a batch certified under authority of the Federal Food, Drug and Cosmetic Act
13. It has been processed or produced in violation of the cottage food rules

## **When are home-based food products subject to sampling?**

Food sampling is usually conducted either randomly or under specific circumstances.

### *Random Sampling*

You likely won't even know if your food product has been randomly sampled, unless the food product comes back from testing with an issue. The Director, or someone the Director authorizes, will purchase home-based food products that have been placed in the marketplace. The most common scenario for when your home-based food product could be subject to random food sampling is if you sell it to a retail food establishment or food service operation, such as a restaurant or grocery store. According to the Ohio Department of Agriculture, random sampling does not usually occur at farmer's markets. Random food sampling also does not usually occur when you are selling your food product directly to the customer from your home, where the product is produced.

## *Specific Circumstances*

Under Ohio Revised Code Section 3715.02(B), home-based food products are specifically subject to food sampling when:

1. A food, food additive, or food packaging material is the subject of a consumer complaint;
2. A consumer requests the sampling after a physician has isolated an organism from the consumer as the physician's patient;
3. A food, food additive, or food packaging material is suspected of having caused an illness;
4. A food, food additive, or food packaging material is suspected of being adulterated or misbranded;
5. A food, food additive, or food packaging material is subject to verification of food labeling and standards of identity; and
6. At any other time the director considers a sample analysis necessary.

## **What happens if there was an issue with your food product?**

If your food product has been subject to food sampling and an issue is found with your product, then you will be contacted by ODA. They will make you aware of what the issue was, such as your product tested positive for a pathogen like E.coli or maybe you forgot to list an ingredient that was found in your product. ODA will then likely inspect your home kitchen. If a pathogen was found, the inspection will likely be focused on figuring out how the problem occurred and how you can remedy it. If your food product is in the marketplace, then a recall may need to be issued.

Home-produced food products typically are not a common source of consumer complaints. But just because there are not as many complaints associated with these types of food products doesn't mean you should be lax in the way you prepare your food products. Preparing safe food products for your customers is essential. Food sampling is a way ODA helps to ensure your business is doing just that.

*Author: Peggy Kirk Hall, Asst. Professor, Agricultural & Resource Law*

