

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Regulated Industries

BILL: SB 1158

INTRODUCER: Senator Jones

SUBJECT: Home Kitchen Operations

DATE: February 7, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>AP</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 1158 allows “home kitchen operations” to sell and offer for sale home kitchen food products. Under the bill, a home kitchen operation means a natural person or an entity that stores, handles, prepares, and packages food products at the residence of the natural person or at the residence of a natural person who has an ownership interest in the entity and sells such products in accordance with the requirements in the bill.

The bill defines a “home kitchen product” to mean food that is:

- Stored, handled, prepared, and packaged by a home kitchen operation;
- Not raw milk, a product of raw milk, or raw oysters;
- Prepared, cooked, and served within 24 hours; and
- Consumed onsite at a home kitchen operation or offsite if the food is picked up by the consumer or delivered within a safe time period based on holding equipment capacity.

Under the bill, a home kitchen operation may serve food for consumption at the location of the home kitchen operation without a public food service establishment license issued by the Division of Hotels and Restaurants within the Department of Business and Professional Regulation.

A home kitchen operation is not required to have a food establishment permit issued by the Department of Agriculture and Consumer Services if it complies with the home kitchen operation requirements in the bill and has annual gross sales of home kitchen food products that do not exceed \$250,000.

In addition, a home kitchen operation may:

- Only sell or provide home kitchen food products directly to consumers and may not sell or provide home kitchen food products to any food reseller; and

- Sell home kitchen food products to consumers in person or remotely by telephone, e-mail, or website, including through a third-party website or mobile application.

A home kitchen operation may deliver food products via an employee or agent of the home kitchen operation, or by a third-party delivery service.

A home kitchen operation must affix an information label to a food product that is sold in a package or container, or on a sign at the point of sale if the home kitchen food product is not sold in a package or container, and on any food-ordering website or mobile application on which the home kitchen operation advertises. The information required to be on the label includes a list of the ingredients in the food product in descending order of predominance by weight and a statement that the food was made in a home kitchen.

The bill takes effect upon becoming law.

II. Present Situation:

Food Safety Laws

The Division of Food Safety within the Department of Agriculture and Consumer Services (department) ensures that safe, wholesome, and properly labeled food is available to the public through the permitting and inspection of “food establishments,”¹ and inspection of food products that are sold or produced in Florida.² The department works in cooperation with the United States Department of Agriculture and the Food and Drug Administration to help ensure compliance with both state and federal regulations.³

A food establishment permit from the department is required to open a food establishment. The department issues three different types of food establishment permits, including retail, wholesale/manufactured, and medical marijuana treatment center edibles.⁴

A food establishment permit holder must allow access by the department or its duly authorized agent during all reasonable hours to any food establishment, any food records, or any vehicle being used to transport or hold food in commerce for the purpose of inspecting such

¹ Section 500.03(1)(p), F.S., defines the term “food establishment” to mean:

...a factory, food outlet, or other facility manufacturing, processing, packing, holding, or preparing food or selling food at wholesale or retail. The term does not include a business or activity that is regulated under s. 413.051, [F.S.], s. 500.80, [F.S.], chapter 509, [F.S.], or chapter 601, [F.S.] The term includes tomato packinghouses and repackers but does not include any other establishments that pack fruits and vegetables in their raw or natural states, including those fruits or vegetables that are washed, colored, or otherwise treated in their unpeeled, natural form before they are marketed.

² Florida Department of Agriculture and Consumer Services, *Division of Food Safety*, available at: <http://www.freshfromflorida.com/Divisions-Offices/Food-Safety> (last visited Feb. 3, 2022). *See also* ch. 500, F.S., the Florida Food Safety Act.

³ Florida Department of Agriculture and Consumer Services, *Food Establishments*, available at: <https://www.fdacs.gov/Business-Services/Food/Food-Establishments> (last visited Feb. 3, 2022).

⁴ *See* Florida Department of Agriculture and Consumer Services, *Food Establishments*, available at: <https://www.fdacs.gov/Business-Services/Food/Food-Establishments> (last visited Feb. 3, 2022).

establishment, records, or vehicle to determine compliance with ch. 500, F.S., and any rule adopted under that chapter⁵.

Cottage Food Operations

A cottage food operation is a natural person or entity that produces or packages food that is not potentially hazardous in the residence of the natural person or at the residence of a natural person who has an ownership interest in the entity and sells such products in accordance with cottage food operation requirements of s. 500.80, F.S.⁶

Cottage food operations are not required to have a food establishment permit under s. 500.12, F.S., dealing with the permit requirements for operators of food establishments and retail food stores.⁷ Cottage food operations must comply with the cottage food law in s. 500.80, F.S., and limit annual gross sales of cottage food products to less than \$250,000 based on all sales of cottage food products at any location, regardless of the types of products sold or the number of persons involved in the operation. A cottage food operation must provide the department with written documentation to verify its annual gross sales upon the department's request to do so.⁸

Cottage food operations may sell, offer for sale, and accept payments for cottage food products over the Internet or by mail order. Cottage food products may be delivered in person directly to the consumer, to a specific event venue, or by United States Postal Service or commercial mail delivery service. A cottage food operation may not sell, offer for sale, or deliver cottage food products at wholesale.⁹ A cottage food operation may only sell cottage food products that are stored on the premises of the operation.¹⁰

Cottage foods operations may only sell cottage food products which are prepackaged with a label affixed that contains:¹¹

- The name and address of the cottage food operation;
- The name of the cottage food product;
- The ingredients of the cottage food product, in descending order of predominance by weight;
- The net weight or net volume of the cottage food product;
- Allergen information as specified by federal labeling requirements; and
- If any nutritional claim is made, appropriate nutritional information as specified by federal labeling requirements.

In addition, the label must have the following statement printed in at least 10-point type in a color that provides a clear contrast to the background of the label: "Made in a cottage food operation that is not subject to Florida's food safety regulations."¹²

⁵ Section 500.147, F.S.

⁶ Sections 500.03(j), F.S.

⁷ See ss. 500.03(p) and (bb), F.S., defining the terms "food establishment" and "retail food store," respectively.

⁸ Section 500.80(1), F.S.

⁹ Section 500.80(2), F.S.

¹⁰ Section 500.80(4), F.S.

¹¹ Section 500.80(3), F.S.

¹² *Id.*

Section 500.80, F.S., does not exempt cottage food operations from any other state or federal tax law, rule, regulation, or certificate.¹³

Cottage Food Products

A cottage food product is any food that is not a potentially hazardous food defined by department rule which is sold by a cottage food operation in accordance with s. 500.80, F.S.¹⁴ The department has not adopted a rule defining the term “potentially hazardous food,” but it has adopted the U.S. Food and Drug Administration’s 2017 Food Code (Food Code).¹⁵

The Food Code defines the term “time/temperature controlled for safety food,” formerly referred to as “potentially hazardous food,” as a “food that requires time/temperature control for safety (TCS) to limit pathogenic microorganism growth or toxin formation.” The term includes:

- Animal food that is raw or heat-treated;
- Plant food that is heat-treated or consists of raw seed sprouts, cut melons, cut leafy greens, cut tomatoes or mixtures of cut tomatoes that are not modified in a way so that they are unable to support pathogenic microorganism growth or toxin formation; and
- Garlic-in-oil mixtures that are not modified so that they are unable to support pathogenic micro-organism growth or toxin formation.¹⁶

The department has identified the following foods as not potentially hazardous and therefore permitted to be produced by a cottage food operation:

- Loaf breads, rolls, biscuits;
- Cakes, pastries, and cookies;
- Honey;
- Jams, jellies, and preserves made from high acid-fruits only;
- Fruit pies and dried fruits;
- Dry herbs, seasonings, and mixtures;
- Homemade pasta;
- Cereals, trail mixes, and granola;
- Coated or uncoated nuts;
- Vinegar and flavored vinegars;
- Popcorn and popcorn balls; and
- Nut butters, including almond, peanut, cashew, etc.¹⁷

¹³ Section 500.80(5), F.S.

¹⁴ Section 500.03(k), F.S.

¹⁵ Fla. Admin. Code R. 5K-4.002(4)(a).

¹⁶ U.S. Food and Drug Administration, 2017 Food Code, subpart 1-201.10, defining “Time/Temperature Control for Safety Food (formerly “potentially hazardous food” (PHF))” Certain foods may be designated as “product assessment required” due to the interaction of their water content and pH values after heat treatment or packaging to control vegetative cells and spores. Such foods are considered TCS food until further study proves otherwise.

¹⁷ See Department of Agriculture and Consumer Services, Division of Food Safety, *Cottage Food Operations (July 2021)*, available at: <https://www.fdacs.gov/Business-Services/Food/Food-Establishments/Cottage-Foods> (last visited Feb. 2, 2022).

Cottage Food Operations Investigations and Complaints

The department may only investigate a cottage food operation if it receives a complaint that a cottage food operation has violated an applicable provision of state food products law¹⁸ or rule adopted under such law.¹⁹ Upon a complaint, an officer or employee of the department may enter and inspect the cottage food operation's premises to determine compliance with applicable state law and departmental rules. A cottage food operation's refusal to permit an authorized officer or employee to enter and inspect the premises is grounds for administrative disciplinary action under s. 500.121, F.S.²⁰

The cottage food operation provisions in s. 500.80, F.S., do not apply to any person operating under a food permit issued pursuant to s. 500.12, F.S.²¹

Preemption

The regulation of cottage food operations is preempted to the state.²² A local law, ordinance, or regulation may not prohibit a cottage food operation or regulate the preparation, processing, storage, or sale of cottage food products by a cottage food operation; however, a cottage food operation must comply with the conditions for the operation of a home-based business under s. 559.955, F.S.²³

Home-Based Businesses

Section 559.955, F.S., preempts the regulation of home-based businesses to the state. Counties and municipalities may not enact or enforce any ordinance, regulation, or policy, or take any action to license or otherwise regulate a home-based business.

A home-based business may operate in an area zoned for residential use and may not be prohibited, restricted, regulated, or licensed in a manner different from other businesses in a local government's jurisdiction, except as provided in s. 559.955, F.S. However, home-based businesses are subject to applicable business taxes under ch. 205, F.S., in the county and municipality in which the home-based business is located.²⁴

A business is considered a home-based business if it operates, in whole or in part, from a residential property and meets the following criteria:²⁵

- The activities of the home-based business are secondary to the property's use as a residential dwelling.

¹⁸ Chapter 500, F.S.

¹⁹ Section 500.80(8), F.S.

²⁰ Section 500.121, F.S., provides disciplinary procedures for violations of ch. 500, F.S., and applicable rules, including the imposition of Class II administrative fines against a cottage food operation that violates ch. 500, F.S. A violation in the Class II category carries a fine not to exceed \$5,000 for each violation. *See* s. 570.971(1)(b), F.S.

²¹ Section 500.12, F.S., requires a permit issued by the department for any person operating a food establishment or retail food store.

²² Section 500.80(4), F.S.

²³ Section 500.80(6), F.S.

²⁴ Section 559.955(2), F.S.

²⁵ Section 559.955(3), F.S.

- The business employees who work at the residential dwelling also reside in the residential dwelling, except that up to two employees or independent contractors who do not reside at the residential dwelling may work at the business.
- Parking related to the business activities of the home-based business complies with local zoning requirements. The business may not generate a need for parking greater in volume than a similar residence where no business is conducted. Local governments may regulate the parking or storage of heavy equipment at the business which is visible from the street.
- As viewed from the street, the residential property is consistent with the uses of the residential areas surrounding the property. Any external modifications to a home-based business must conform to the residential character and architectural aesthetics of the neighborhood. The home-based business may not conduct retail transactions at a structure other than the residential dwelling; however, incidental business uses and activities may be conducted at the residential property.
- All business activities comply with any relevant local or state regulations concerning signage and equipment or processes that create noise, vibration, heat, smoke, dust, glare, fumes, or noxious odors. However, such regulations on a business, absent signage, may not be more stringent than those that apply to a residence where no business is conducted.
- All business activities comply with any relevant local, state, and federal regulations concerning the use, storage, or disposal of hazardous materials. However, such regulations on a business may not be more stringent than those applicable to a residence where no business is conducted.

Any adversely affected current or prospective home-based business owner may recover reasonable attorney fees and costs incurred instituting or defending a legal action concerning the validity of a local government's home-based business regulations.²⁶

The home-based business requirements of s. 559.955, F.S., do not supersede any current or future declaration of condominium adopted pursuant to ch. 718, F.S., cooperative document adopted pursuant to ch. 719, F.S., or declaration of covenants adopted pursuant to ch. 720, F.S. Any local laws, ordinances, or regulations related to transient public lodging establishments that are not otherwise preempted under ch. 509, F.S., are not affected by s. 559.955, F.S.²⁷

Public Food Service Establishments

The Division of Hotels and Restaurants within the Department of Business and Professional Regulation licenses, inspects, and regulates public food service establishments in Florida under ch. 509, F.S.²⁸ The term “public food service establishment” means:

any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure where food is prepared, served, or sold for immediate consumption on or in the vicinity of the premises; called for or taken out by customers; or prepared prior to being delivered

²⁶ Section 559.955(4), F.S.

²⁷ See. 509.032(7), F.S., relating to the state preemption of vacation rental regulation and providing exceptions.

²⁸ The Division of Hotels and Restaurants also licenses and regulates public lodging establishments, elevators, escalators, and other vertical conveyance devices. See Department of Business and Professional Regulation, *Division of Hotels and Restaurants*, <http://www.myfloridalicense.com/DBPR/hotels-restaurants/> (last visited Feb. 3, 2022).

to another location for consumption. The term includes a culinary education program, as defined in s. 381.0072(2), which offers, prepares, serves, or sells food to the general public, regardless of whether it is inspected by another state agency for compliance with sanitation standards.²⁹

Several food service places are exempted from the definition of public food service establishment, such as certain schools and universities operated for students and faculty, and places maintained by certain religious, fraternal, and civic organizations.³⁰

Establishments regulated under ch. 509, F.S., must be licensed and inspected by the Division of Hotels and Restaurants, and are subject to sanitary standards, staff training and test requirements, administrative rules, and immediate closure upon a finding that continued operation presents a severe and immediate threat to the public health.³¹

III. Effect of Proposed Changes:

The bill amends s. 500.80, F.S., to allow “home kitchen operations” to sell and offer for sale home kitchen food products in a manner similar to cottage food operations.

The bill creates s. 500.03(1)(t), F.S., to define the term “home kitchen operation” to mean a natural person or an entity that stores, handles, prepares, and packages food products at the residence of the natural person or at the residence of a natural person who has an ownership interest in the entity and sells such products in accordance with s. 500.80, F.S.

Under the bill, a home kitchen operation is not a public food service establishment as defined in s. 509.013(5), F.S.

The bill creates s. 500.03(1)(s), F.S., to define the term “home kitchen product” to mean food that is:

- Stored, handled, prepared, and packaged by a home kitchen operation;
- Not raw milk, a product of raw milk, or raw oysters;
- Prepared, cooked, and served within 24 hours; and
- Consumed onsite at a home kitchen operation or offsite if the food is picked up by the consumer or delivered within a safe time period based on holding equipment capacity.

Under the bill, a home kitchen operation may serve food for consumption at the location of the home kitchen operation without a public food service establishment license issued by the Division of Hotels and Restaurants.

A home kitchen operation is not required to have a food establishment permit, as required in s. 500.12, F.S., if the home kitchen operation complies with this section and has annual gross sales of home kitchen food products that do not exceed \$250,000.

²⁹ See s. 509.013(5), F.S.

³⁰ *Id.*

³¹ See s. 509.035, F.S.

In addition, a home kitchen operation may:

- Only sell or provide home kitchen food products directly to consumers and may not sell or provide home kitchen food products to any food reseller; and
- Sell home kitchen food products to consumers in person or remotely by telephone, e-mail, or website, including through a third-party website or mobile application.

A home kitchen operation may deliver food products via an employee or agent of the home kitchen operation, or by a third-party delivery service.

A home kitchen operation must affix an information label in a clear and conspicuous manner for the consumer. The information label may be:

- Affixed to a kitchen food product that is sold in a package or container;
- On a sign at the point of sale if the home kitchen food product is not sold in a package or container; and
- On any food-ordering website or mobile application on which the home kitchen operation advertises.

The information label must include:

- The name and telephone number of the home kitchen operation that prepared the home kitchen food product;
- The common or usual name of the home kitchen food product;
- A list of the ingredients in descending order of predominance by weight if a home kitchen food product contains more than one ingredient; and
- The following statement: “Made in a home kitchen.”

The information label for a home kitchen product is similar to the information label required for cottage food products, except that the home kitchen product label must include a telephone number instead of an address of the food operation, and is not required to provide allergen information and appropriate nutritional information as specified by federal labeling requirements if any nutritional claim is made. In addition, the label is not required to state in conspicuous type that the home kitchen operation is not subject to Florida’s food safety regulations.

The bill includes home kitchen operations in the preemption provisions applicable to cottage food operations. Under the bill, the regulation of home kitchen operations is preempted to the state. A local law, ordinance, or regulation may not prohibit a home kitchen operation or regulate the preparation, processing, storage, or sale of home kitchen products by a home kitchen operation; however, a home kitchen operation must comply with the conditions for the operation of a home-based business under s. 559.955, F.S.

The bill amends s. 500.121, F.S., to apply the disciplinary procedures for violations of ch. 500, F.S., to home kitchen operations.³²

The bill takes effect upon becoming law.

³² *Supra* n. 24.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill allows persons to sell or offer for sale home kitchen products, which may provide additional income for such persons.

C. Government Sector Impact:

The department estimates a negative fiscal impact of \$1,435,310 for Fiscal Year 2022-2023, Fiscal Year 2023-2024, and Fiscal Year 2024-2025.³³

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill may affect the enforcement of cottage food operations requirements under s. 500.80, F.S. Cottage food operations and home kitchen operations are not required to have a food establishment permit under s. 500.12, F.S., and neither operation is subject to routine inspections

³³ Department of Agriculture and Consumer Services, *Agency Analysis for SB 1158*, p. 4 (Dec. 22, 2022) (on file with the Senate Committee on Regulated Industries).

by the department. Under the bill, it may be difficult to distinguish between the two types of operations. For example, if a cottage food operation sells, or offers for sale, a food product that would not qualify as a cottage food product, it could represent itself as being a home kitchen product and evade the cottage food operation requirements. However, in such an event, the sale, or offering for sale, of the product may be subject to the home kitchen operation requirements.

The department has expressed several concerns with the bill.³⁴ The absence in the bill of onsite food safety inspections for home kitchen operations may increase the general public's exposure to foodborne pathogens, chemical contaminants, fraud, intentional contamination, allergens, and other food safety risks. For example, as stated by the department, botulism is a serious and life-threatening illness which is often caused by improperly processed home-canned foods. In addition, there is also a safety concern from undeclared allergens through mislabeling or accidental cross-contact which is the leading cause of food recalls in the United States, with 150 Americans dying each year because of allergic reactions to food.³⁵

According to the department, the bill presents the following compliance and enforcement challenges:

- The self-regulation of prepare, cook, and serve times, which the department would be unable to verify;
- The self-reporting of annual sales which the department would be unable to verify;
- The difficulty of enforcing administrative action or stop orders on an unpermitted establishment or one in a private residence, even with a confirmed violation; and
- The difficulty locating home kitchen operations or mobile vendors when labeling violations or food-borne illnesses occur since there is no permitting or labeling requirement involving a physical address.

The department states that the bill does not exclude products consisting of or containing hemp extract as defined in s. 581.217, F.S., relating to the state hemp program, from the types of food products that may be stored, prepared or cooked by the home kitchen operation. The department states that the bill “would negatively affect a new and growing hemp industry with known potency, fraud, and contamination concerns that have been documented through field inspections and lab testing.”³⁶

In addition, the department states that the requirement in the bill that food consumed offsite must be picked up by the consumer or delivered within a safe time period based on “holding equipment capacity” does not reflect standard food safety protocols. Food safety protocols safeguards are based on time and temperature control and not on the “holding equipment capacity.” The department warns that “inadequate cold-holding of certain foods combined with extended storage times can lead to pathogen growth and foodborne illness.”³⁷

³⁴ *Id.* at p. 3 and p. 4.

³⁵ *Id.* at p. 2.

³⁶ *Id.* at p. 6.

³⁷ *Id.* at p. 7.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 500.03, 500.80, and 500.121.

IX. Additional Information:

A. **Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
