Guidance for Uniform Use of House Enrolled Act 1298 (HEA 1298)

Overview

The recently concluded session of the Indiana State Legislature through HEA 1298 has acted to improve food safety during transport by requiring coordinated response efforts of law enforcement and public health agencies. The new law adds Chapter 27 to Indiana Code, IC 8-2.1. This document is provided for the purpose of assisting the Indiana State Police (ISP), local health departments (LHDs) and other Indiana food regulatory agencies in the uniform use of HEA 1298. See page 6.

Related to the transportation of food products, HEA 1298:

- Provides that vehicles improperly transporting commercial food supplies may be stopped by ISP and may require a state or LHD response.
- Provides that a person who operates a motor vehicle for the transportation of food without complying with health rules or certain health requirements concerning food transportation commits a Class A infraction.
- Authorizes a law enforcement officer to inspect, detain, and contact a health inspector to inspect, and in certain cases, impound a motor vehicle that does not comply with public health law and rules.
- Provides that a health inspector may order the disposal of certain food and the impoundment of non-complying motor vehicles.
- Provides that a person who transports food that was ordered disposed commits a Class A misdemeanor; and
- Provides civil immunity for certain individuals enforcing food transportation safety laws.

The Indiana State Department of Health (ISDH) has previously developed the Indiana Food Transportation Inspection State Form #54818 for the use by LHDs to respond in these instances. An ISDH guidance document with the subject: "Health Department Response to Vehicles Improperly Transporting Food Products", released to LHDs on January 13, 2012 is available for review at: www.in.gov/isdh/files/Health_Dept_Response_to_Vehicles.pdf

Acceptable temperature for purposes of this guidance means a temperature established in a rule or regulation adopted by the state department of health (Wholesale rule, 410 IAC 7-21 or Retail rule, 410 IAC 7-24) with respect to the storage and transportation of a particular food and enforced by the state department of health or a LHD. Acceptable temperatures include:

41F or less for potentially hazardous foods not listed later;
45F or less for pasteurized milk and dairy products in intrastate and interstate commerce;
*45F **air temperature** (not actual egg temperature while in transit) or less for raw, shell eggs in interstate and intrastate commerce*;
Live molluscan shellfish on ice at no specified temperature;
Raw poultry on ice at no specified temperature;
41F or less for any sized portion of raw meat
Frozen food must be kept frozen (**should** be 0F, but may be up to 32F...most frozen items should be solid when frozen, but some frozen foods may not be solid due to factors such as salt content)

*State and federal law only require that raw shell eggs while in wholesale transport be stored in an **air temperature** of 45F. There is no product temperature required for raw shell eggs until they are received at a retail food establishment, as specified in 410 IAC 7-24-166(b). Most, if not all, of the truck inspections would fall under the wholesale rule (410 IAC 7-21-45(e)) where there is a reference to egg law. For purposes of determining if raw shell eggs on a truck are at an

acceptable temperature, only an **air temperature** at or near 45F could be used to make that determination. There is no requirement that the eggs be at any specified temperature prior to being received at the retail facility. **Use factors, such as a local delivery vehicle, could make infrared thermometer readings vary enough that the law enforcement officer**

or attending health inspector may not be able to take action on raw shell eggs, even if actual egg temperatures are above 45F. Cooked eggs in 5 gallon buckets, raw pasteurized eggs in cartons, and pasteurized-in-the-shell eggs must be transported at 41F or less.

Contamination has occurred when a packaged or unpackaged food product has come into contact with a physical, chemical or biological substance originating from a non-food source. Examples would be toxic substances in powder or liquid form, which could absorb into packaging or into food. Consideration must be made for the capacity of the packaging to protect the food from direct contact with the contaminant. Other examples of contamination would include unpackaged food which is in contact with visibly soiled surfaces, equipment and utensils. Dust, rain/snow, rocks, pests and pest residues could be considered environmental contaminants.

Rain should not be considered a contaminant for something such as raw produce (tomatoes, apples, pumpkins, cucumbers) which has been harvested from a field and are being transported in bulk to a processing facility or a retail facility. Cucumbers, having been processed into pickles, and being transferred to a packaging facility in bulk, open-top 100 gallon containers while transported within a covered truck cargo area could be considered contaminated if rained on.

Bags of raw onions stored on a "clean"(cleaner than the field from which they were harvested) floor of a vehicle for transport is not contamination, but the same bags of onions in contact with a pool of liquid on the floor of a truck would be contaminated.

Cross-contamination has occurred when a food product has come into contact with a physical, chemical or biological substance originating from another food which renders the food a greater food safety hazard than it would have been had the contact not occurred.

Examples of cross-contamination include the following:

(1) Raw food of animal origin which has not been separated vertically or laterally during transport from raw ready-to-eat food, including other raw food of animal origin, such as fish for sushi or molluscan shellfish, or other raw ready-to-eat food, such as vegetables; and cooked ready-to-eat food.

(2) Except when combined as ingredients, types of raw food of animal origin which have not been separated from each other, such as beef, fish, lamb, pork, and poultry during loading and transport.

(3) Mixing damaged, spoiled, or recalled food in direct contact with food that has not been damaged, spoiled or recalled.

(4) Mixing via direct contact fruits and vegetables which have not been washed with those considered to be ready-to-eat (RTE).

More examples:

- Raw poultry dripping or having dripped into a case of raw vegetables, a case of raw ground beef, or a case containing packaged or unpackaged fish;
- Raw seafood dripping or having dripped into or onto a case of fruit;
- Liquid coming from either raw chicken and/or raw seafood absorbing into boxes of raw vegetables;
- Cases of food absorbing an unidentifiable liquid from the floor of a truck could be considered contamination or cross-contamination based on most probable source of the liquid, for example, if the load contains items on melting ice.

- Solidly frozen food stored above other solidly frozen food is **not** cross-contamination. Cases of uncooked frozen chicken patties being transported above cases of frozen vegetables is not a hazard unless the chicken is thawing and dripping into/onto the vegetables.

Health inspector refers to an agent or employee of the Indiana State Department of Health (ISDH) or a LHD.

Impound means to place a vehicle in the custody of the law until a question affecting it is decided.

Law enforcement officer means a state police officer; or a state police motor carrier inspector; with authority to enforce this article.

Local health department (LHD) refers to a local health department established under IC 16-20 or the health and hospital corporation created under IC 16-22-8.

Motor vehicle for the transportation of food means a motor vehicle that is subject to inspection under IC 8-2.1-24, including under rules prescribed under IC 8-2.1-24; and engaged in the transportation of food.

Potentially hazardous food (PHF) means

(a) a food that is natural or synthetic and requires temperature control because it is in a form capable of supporting any of the following:

(1) The rapid and progressive growth of infectious or toxigenic microorganisms.

(2) The growth and toxin production of Clostridium botulinum.

(3) In raw shell eggs, the growth of Salmonella enteritidis.

(b) The term includes the following:

(1) A food of animal origin that is raw or heat-treated.

(2) A food of plant origin that is heat-treated or consists of raw seed sprouts.

(3) Cut melons.

(4) Garlic-in-oil mixtures that are not modified in a way that results in mixtures which do not support growth as specified under subsection (a).

(c) The term does not include any of the following:

(1) An air-cooled hard-boiled egg with shell intact.

(2) A food with an A_w (water activity) value of eighty-five hundredths (0.85) or less.

(3) A food with a pH level of four and six-tenths (4.6) or below when measured at seventy-five (75) degrees Fahrenheit.

(4) A food, in an unopened hermetically sealed container, that is commercially processed to achieve and maintain commercial sterility under conditions of non-refrigerated storage and distribution.

(5) A food for which laboratory evidence demonstrates that the rapid and progressive growth of infectious or toxigenic microorganisms or the growth of Salmonella enteritidis in eggs or Clostridium botulinum cannot occur, such as a food that:

(A) has an a_w (water activity) and a pH that are above the levels specified under subdivisions (2) and (3); and
(B) may contain a preservative, other barrier to the growth of microorganisms, or a combination of barriers that inhibit the growth of microorganisms.

(6) A food that may contain an infectious or toxigenic microorganism or chemical or physical contaminant at a level sufficient to cause illness, but that does not support the growth of microorganisms as specified under subsection (a).

PHF vs. Perishable Food

All food classified as a potentially hazardous food can be considered "perishable", but not all perishable food can be considered a PHF. Raw fruits and vegetables, mushrooms, edible flowers, some types of chocolate candy, fruit juices would be considered perishable, and often are transported under refrigeration, but would not be considered a PHF,

meaning there would be no specified temperature required under law for their transport. A shipping or receiving company may have their own specific temperature requirements for a food for quality purposes, but these temperatures are not actionable by regulatory agencies.

A food referred to as a "potentially hazardous food" is also commonly referred to as a "Time/Temperature Controlled for Safety Food" or "TCS" Food. The terms are synonymous.

Authority

Food trucks subject to the requirements in HEA 1298 may or may not be transporting food to or from Indiana food establishments. It may be necessary to utilize the Indiana Code (IC), rather than the Indiana Administrative Code (IAC). Authority for inspection, embargo, and condemnation of food and vehicles by a state or LHD official is found in IC 16-42-1, IC 16-42-2, and IC 16-42-5.

Discussion

Subsection 7 (c) of HEA 1298 says that if a law enforcement officer determines a vehicle not to be in compliance with stated health regulations, the officer may contact a state or local health inspector to inspect the motor vehicle and may detain the vehicle for purposes of the inspection.

Subsection 7 (d) of the new law says if a health inspector is present to inspect a vehicle and finds a violation of section 6, the health inspector may order disposal of part or all of the food, order impoundment of the vehicle, or both. It is the food owning or transporting company's responsibility to remove and dispose of food products from the truck, not ISP or the attending health inspector. Items may be moved for purposes of investigation.

Disposal of large quantities of condemned food should occur at a landfill where product denaturing can be observed. Smaller quantities, for example, may be disposed of, with permission, at the carriers next scheduled stop site when that is reasonably close and within the same LHD jurisdiction and under the oversight of the LHD representative. Assistance can be requested from other agencies when condemned food must be disposed of in another county. Sometimes local waste hauling companies will provide a packer truck for disposal.

It is recommended the health inspector present should be responsible for decisions on destroying food with proper documentation of the items and the conditions for disposal. The owning or transporting company is responsible for any penalties and costs associated with condemned food disposition or vehicle impounding. If the company which owns the food authorizes the carrier to act or prohibits the carrier to act, that fact should be verified and noted.

The attending health inspector will have to work with the ISP when it decides to order a motor vehicle to be impounded. According to HEA 1298, IC 8-2.1-27(7)(g) will provide that a person who operated a motor vehicle that has been impounded may not obtain possession of the motor vehicle until the person complies with the requirements of the statute, including any costs associated with the disposal of part or all of the food.

It is recommended that after gaining compliance with an order to dispose and/or impound a vehicle, the health inspector should release the vehicle to the law enforcement officer-in-charge of the stopped vehicle or to the agency of the law enforcement officer who initially determined there to be a violation of Section 6, since there may remain unresolved issues related to IC 8-2.1-24.

Procedures for impounding vehicles should follow established ISP protocol for driving or towing the vehicle, and the location for impoundment should be determined by the law enforcement officer-in-charge of the scene according to policies established for enforcement of regulations related to IC 8-2.1-24.

Penalties

Subsection 7(e) says that after an inspection of the vehicle where a violation of food safety regulations was found by a health inspector, a Class A infraction has been committed. This is in addition to penalties listed in 410 IAC 7-23, "Schedule of Civil Penalties", effective November 13, 2004.

Temperature Measuring Devices

Recommended equipment for determining compliance should include:

- camera;
- thermometers (infrared and probe-type);
- alcohol swabs;
- gloves and hand sanitizer should be carried for personal safety

Infrared thermometers (IRTs) can be used to give a quick preliminary indication that a food product is potentially out of temperature and to establish a reason to investigate further; however, it is recommended an internal temperature measurement using a thermometer that is less subject to environmental and user variables, such as a thin probe thermocouple or a high quality digital thermometer, should occur to confirm there is a food temperature violation under section 6 of HEA 1298.

Points to remember when using IRTs:

According to literature provided for the "Fluke" brand infrared thermometers, there is a 10:1 ratio of distance from the subject surface to the measured surface area (D:S=10:1). This means when the unit is at a distance of 10 inches from the subject surface, the thermometer will measure the average temperature of the surface area of a 1 inch diameter circle. At a distance of 40 inches, the thermometer will measure the average temperature of the surface area of a 4 inch diameter circle. Think of a cone shape extending from the end of the hand held unit. The farther away the unit is from the surface being measured, the greater the surface area being measured. Large distances can result in larger reading variations due to the temperatures of multiple surfaces in the measurement area. Battery strength and shiny surfaces can also have an effect on readings. Use fresh batteries. Take more than one reading to determine whether to further investigate.
According to "Fluke" brand literature, their "Fluke 62 Mini" infrared thermometers are accurate to:

± 2F when used in an environment of 50-86F

± 3F (or 1.5% of reading) when used in an environment outside of 50-86F

± 4F when used in an environment under 14F

Probe-type thermometers tend to give the most accurate food temperature measurements in the widest range of environments. Some brands are accurate to within ± .9F in the operating ranges found on refrigerated vehicles.
In some cases, the temperature of the outside packaging of a food may not be the same as the food inside. If the truck is now cooling a product that earlier had warmed, the packaging temperature might be cooler than the food. If the food was previously cool and is now warming the packaging may be warmer than the food. When possible, avoid poking holes into food. Food that's had the packaging compromised will most often not be saleable. If a valid temperature can be obtained by folding a product in half, or laying one package upon another, that is preferable. A valid food temperature is measured when 1-2 inches of the end of a thermometer probe is completely covered by the subject food, ensuring the resultant reading is based entirely on food temperature and not influenced by surrounding air.

It is recommended an actual food temperature be taken with a calibrated probe-type thermometer by either the law enforcement officer or the attending health inspector to make a determination that the vehicle is not in compliance with applicable rules of the state department of health concerning the transportation of food.

Accuracy of thermometers should be verified regularly (suggest every 6 months) by the metrology lab of the ISDH Weights and Measures Program.

Conclusion

HEA 1298 provides ISP, ISDH and LHDs new responsibilities for food safety during transport. The ISP is now responsible for making an initial determination of a vehicle load storage problems, unacceptable PHF temperatures or other issues identified. Careful use of the IRTs must be exercised to ensure an accurate temperature reading is obtained before contacting the health inspector. Under HEA 1298, once a determination has been made that a vehicle is not in compliance with food safety requirements, the ISP officer should contact an ISDH or LHD health inspector to assist in verifying the determination and then gaining compliance. The ISP will detain the vehicle until a health inspector can inspect the vehicle and issue orders to dispose all or part of the food, or to have the load rearranged and possibly embargo any food or impound the truck. When condemned food has been disposed, rearranged, or any other ordered remedy has been met there may still remain other compliance issues under IC 8-2.1-24, the health inspector should release the vehicle to ISP, or should verify with ISP that the vehicle can be placed back into service.

HOUSE ENROLLED ACT No. 1298

SECTION 1. IC 8-2.1-27 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]:

Chapter 27. Transportation of Food

Sec. 1. As used in this chapter, "acceptable temperature" means a temperature established in a rule or regulation adopted by the state department of health with respect to the storage and transportation of a particular food and enforced by the state department of health or a local health department.

Sec. 2. As used in this chapter, "health inspector" refers to an agent or employee of the state department of health or a local health department.

Sec. 3. As used in this chapter, "law enforcement officer" means: (1) a state police officer; or
(2) a state police motor carrier inspector; with authority to enforce this article.

Sec. 4. As used in this chapter, "local health department" refers to a local health department established under IC 16-20 or the health and hospital corporation created under IC 16-22-8.

Sec. 5. As used in this chapter, "motor vehicle for the transportation of food" means a motor vehicle that is: (1) subject to inspection under IC 8-2.1-24, including under rules prescribed under
IC 8-2.1-24; and
(2) engaged in the transportation of food.

Sec. 6. A person may not operate a motor vehicle for the transportation of food upon a public highway unless the motor vehicle is in compliance with applicable rules adopted by the state department of health concerning the transportation of food.

Sec. 7. (a) A law enforcement officer may inspect a motor vehicle used to transport food to determine compliance with section 6 of this chapter.

(b) This subsection applies if, during the course of an inspection under subsection (a), a law enforcement officer determines that:
(1) the temperature of the food is more than two (2) degrees above the acceptable temperature;

(2) the food exhibits outward signs of contamination, spoilage, deterioration, putrefaction, or infestation; or

(3) the food is improperly loaded in a manner that increases the risk of cross-contamination.

A person who operates a motor vehicle described in this subsection commits a Class A infraction.

(c) If, during the course of an inspection under subsection (a), a law enforcement officer determines that the motor vehicle is not in compliance with applicable rules and regulations adopted by the state department of health concerning the transportation of food, the law enforcement officer:

(1) may contact a health inspector to inspect the motor vehicle; and

(2) may detain the motor vehicle and its operator for purposes of the inspection.

(d) If a health inspector is present to inspect a motor vehicle and finds a violation of section 6 of this chapter, the health inspector may order either or both of the following:

(1) Disposal of part or all of the food.

(2) Impoundment of the vehicle.

(e) The penalty under this subsection is in addition to any penalties provided in IC 9, IC 16, or rules or regulations adopted by the state department of health. This subsection applies if a health inspector, after inspection of a motor vehicle under subsection (d), finds a violation of section 6 of this chapter. A person who operates a motor vehicle described in this subsection commits a Class A infraction.

(f) A person who recklessly, knowingly, or intentionally transports food that a health inspector ordered to be disposed under subsection (d)(1), other than for the purpose of disposal, commits a Class A misdemeanor.

(g) A person who operated a motor vehicle impounded under subsection (d)(2) may not obtain possession of the motor vehicle until the person complies with the requirements of this chapter, including paying any costs associated with the disposal of food under subsection (d)(1).

Sec. 8. The following are not liable in a civil action for an official act done or omitted in connection with the performance of duties under this chapter:

(1) An agent or employee of the department.

(2) An agent or employee of the state police department.

(3) An agent or employee of the state department of health.

(4) An agent or employee of a local health department.

(5) Any other individual charged with enforcing:

(A) this article; or

(B) rules or regulations adopted by the state department of health concerning the transportation of food.

SOURCE: IC 34-30-2-24.3; (12)HE1298.1.2. --> SECTION 2. IC 34-30-2-24.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 24.3. IC 8-2.1-27-8 (Concerning persons who enforce certain food transportation safety laws).**

SOURCE: ; (12)HE1298.1.3. --> SECTION 3. **An emergency is declared for this act.**