

Food Sales at Agritourism Operations: Legal Issues

Factsheet

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Thinking about selling food at your agritourism operation? Offering food products is a good way to attract people to the farm and increase business revenues, but selling food also raises legal issues. Whether you want to sell fresh produce, cottage foods or baked goods, or prepare and serve food on-site, there are legal risks and requirements that may come into play. Consider these important questions about food sales:

- Do zoning laws allow you to conduct food sales?
- What food safety laws apply to your foods?
- Do you need a food sales license?
- What if someone gets sick from your food product?
- Must you collect sales tax on the food items?

The answers to these questions depend upon your state and local laws. The following information should help you start to find the answers to your questions, but be sure to locate the specific laws in your state and locality and seek legal guidance from an attorney in your state.

Zoning laws

Does the law allow you to conduct food sales on your property? If your community is zoned, your zoning laws should address whether selling food at your property is a permissible activity. Typically, a zoning resolution or ordinance for a community designates different zoning “districts” and determines the “permissible uses” or “conditional uses” that may occur on land parcels within each zoning district. Different types of food sales can fall under different types of uses. For example, produce sales on a farm might be a “farm market” or “grocery” use, while preparing

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individual food items on the farm might be designated as a “restaurant” or “food service” use. Some zoning resolutions also treat “agritourism” as a type of land use and define permissible activities within the definition of agritourism. The classifications and definitions will vary from state to state and community to community.

Check your local zoning resolution to identify what zoning district your land is in and review the provisions for permitted uses, making sure that you understand how the zoning resolution defines your proposed food sales activity. Your food activity might fall in the “conditional use” category. This means that you must seek approval of the activity by the local board of zoning officials and the board may place conditions upon your activity if approved. An activity that is not a permitted or conditional use is a prohibited use for the zoning district. Typically, a request to rezone the property as a different type of zoning district is the only remedy for converting a prohibited use into a permitted use.

Note that some states have state laws that could affect whether food sales are permissible. For example, Ohio’s “agricultural exemption” from local zoning includes “agritourism” activities. The law prevents local governments from enacting zoning regulations that prohibit agritourism activities.¹ Because of the uniqueness and complexity of zoning laws, it can be very helpful to talk with your local zoning officer or a land use attorney to fully understand how zoning law affects your property. For more information about agritourism and zoning, see our other fact sheet in this series on “Agritourism Activities and Zoning.”

Food safety and licensing laws

Are there food safety standards you must follow? Do you need a license for your proposed food sales activity? Food safety and licensing laws go hand in hand in aiming to ensure safe handling of food and reduce risks of contamination incidents. The specific standards and licensing requirements that apply to your situation will depend upon the type of food you’ll be selling and your role in preparing the food for sale. Obtaining a license usually involves submitting an application and passing an inspection that verifies your compliance with food safety regulations. State laws vary, but here are examples of foods that may require you to obtain a license and comply with food safety standards:

- Foods prepared and served on-site in individual servings, such as sandwiches, hot dogs, pizza, soups, and full meals.
- Potentially hazardous foods processed on site and packaged for sale, such as salsas, pickles, cheesecakes and other foods that are acidified or require temperature control.
- Eggs, meats and dairy items, but note that many states exempt eggs and certain meats from licensing requirements if the items are raised and processed on the farm where sold.

Some food sales situations don't require a license or compliance with food safety standards, or may be subject to minimal requirements. Examples of these include:

- “Cottage foods” prepared in a residential kitchen, which typically includes jams, jellies, baked goods and other non-potentially hazardous foods that don't require temperature control. State “cottage food” laws vary tremendously by state, so be sure to understand your state law. View the National Agricultural Law Center's compilation of state cottage food laws at <https://nationalaglawcenter.org/state-compilations/>.
- Mobile units and “food trucks” owned and operated by another party. Typically, the party that owns the mobile unit is the party that is subject to licensing and food safety requirements.
- Fresh, unprocessed produce direct from the farm, but note that you may be subject to the Produce Safety Rule of the Food Safety Modernization Act, which establishes production practices for growing and handling the produce. Smaller produce growers can be exempt from this rule. A tool to help determine if you are exempt from the rule is available at <https://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM472499.pdf>.

As with zoning, food licensing and food safety requirements vary by state and can be complex. Take care to obtain and understand the laws that apply in your state and locality. Legal assistance can be critical to ensuring compliance.

Product liability laws

If someone gets sick from food served at your agritourism operation, will you be liable? Food product liability is a serious concern for those who produce or sell food. One in six people every year experience a food borne illness, with 128,000 needing hospitalization and 3,000 dying from the illness.² Many factors would determine a liability outcome, but it's possible that an agritourism operation could be liable for selling food that causes illness or death.

All states have product liability laws that address liability for harm caused by “products,” which encompasses food products. Generally, a producer or seller of a food product can be liable if someone is harmed because the product is “defective.” A food product that is contaminated or unsafe could be deemed “defective.” If the harmed party can prove that the food was contaminated, such as by carrying a virus or bacteria like E. Coli, Listeria, Norovirus or Salmonella, both the party that manufactured the food and the party selling the food can be liable for the harm the food caused.

There are many ways to reduce the risk of food product liability, however. The main causes of foodborne diseases are improper storage and preparation of food and food ingredients, cross-contamination, and improper hygiene by food handlers.³ Proper handling and storage is critical to food safety success, and compliance with food safety regulations can ensure that you're reducing your risks of improper handling and storage. Carefully and constantly train employees to know and carry out proper handling practices. States and industries offer many food safety training programs, some required

and some voluntary. Cleanliness of food areas is also important, and implementing a regular “deep cleaning” schedule can be a strong risk management practice.

Agritourism operations with farm animals also face the risk that of transmitting diseases from animals to humans, referred to as “zoonotic disease transmission.” Food consumption at the agritourism operation is one way to transmit zoonotic disease transmission. To reduce this risk, keep food areas as far as possible away from animal areas, prohibit food consumption in animal areas, and provide handwashing stations at the exits from animal areas. For more information on zoonotic diseases, see our other fact sheet in this series, “Farm Animals and People: Liability Issues for Agritourism.”

Product liability insurance is a necessary tool for addressing product liability risk. Agritourism operations should review their food operations with insurance carriers and ensure that all food activities have sufficient insurance coverage.

Sales tax laws

Must you collect sales tax on food items you sell? The answer to this question is entirely dependent upon state and local tax laws. Nearly all states that have a sales tax also have unique laws for food sales. These laws can vary based upon the type of food item and where the purchaser consumes the food. For example, many states exempt products of the farm sold by the farmer who raised them from sales tax.⁴ Thirty seven states exempt most “grocery sales,” or food purchased for home consumption, from the state sales tax.⁵ Some laws exempt the sale of food for consumption off the premises where sold from sales tax but require sales tax collection on food consumed on the premises of the seller.⁶ Certain candies, beverages or heated foods might not fall under the sales tax exemption for food⁷ and a local government may have a different requirement for food sales than the state law.⁸

The variations and complexities in state and local sales tax laws for food highlight the importance of obtaining sound tax advice. Before engaging in food sales, understand which food items are subject to sales tax. If the operation will be selling foods that require the collection of sales tax, you’ll need to follow state and local provisions for establishing a sales tax accounting, reporting and payment system. The state and local agencies that oversee taxation typically offer useful resources and guidance on sales taxes, and accountants and similar professionals can be helpful in ensuring sales tax compliance.

Pulling it all together

If you’ve read this publication then you’ve taken an important step toward addressing the legal issues that come with selling food at an agritourism operation. The following checklist may help you pull it all together and continue through your next steps. As you move forward, be sure to meet with your attorney, insurance provider and accountant to confirm your understanding of the laws and legal issues and review your legal compliance and risk management plans for your food sales endeavors.

Food Sales at Agritourism Operations: A Checklist for Agritourism Businesses

This checklist is not exclusive, but serves as a starting point for organizing and considering the legal issues that food sales raise for agritourism operations.

1. Understand how zoning laws affect your food sales.

- If you are in a state that has zoning exemptions or exceptions that apply to agriculture or agritourism, locate the law and ensure that your proposed activity falls under its provisions.
- If you are in an area that is subject to zoning but is not covered by an exemption from zoning, locate your local zoning resolution and identify your zoning district. Determine if your type of food sales is a “permitted” or “permissible” or other type of use that is allowed to take place in your district, a “conditional use” that requires approval of the activity by the local board of zoning officials, or a prohibited use that could only occur through a rezoning of the property or a similar special action.
- Talk with your local zoning officials to fully understand how your state and local zoning laws and exemptions affect your proposed food sales activities.

2. Understand how food safety and food licensing laws affect your food sales.

- If the food items you want to sell are “cottage foods” such as baked goods, jams and other non-potentially hazardous foods, determine how your state cottage food law affects you. Find your state cottage food law at <https://nationalaglawcenter.org/state-compilations/>.
- If your foods are not subject to a cottage food law, determine whether you must obtain a food sales license from your local or state agency in order to sell the food items.
- If you are growing the produce you are selling, determine whether you are subject to or exempt from the Food Safety Modernization Act. Refer to this information from the FDA: <https://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM472499.pdf>
- Identify the food safety regulations and practices required for preparing and selling your food, and generate a plan for implementing the practices.

3. Understand how product liability laws affect your food sales

- Locate and review information about your state product liability laws and food sales.
- Train employees to know and carry out proper food handling practices.
- Develop a regular cleaning and “deep cleaning” schedule for your food areas.
- If you also have farm animals, develop a plan to keep food areas away from animal areas, prohibit food consumption in animal areas, and provide handwashing stations.
- Review product liability options with your insurance provider and obtain adequate insurance coverage for your food sales activities.

4. Understand how sales tax laws affect your food sales.

- Determine whether you must collect state and local sales tax for the types of foods you want to sell in the location you’ll be selling the foods.
- Refer to your local and state taxing agencies for information and explanations of the laws and the exemptions that apply to different types of food and to foods raised by the seller.

5. Consult with your professionals to confirm your understanding and plans for moving forward.

References and Resources

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¹ Ohio Revised Code § 303.21(C)(4)(for counties) and Ohio Revised Code § 519.21(C)(4) (for townships).

² Estimates of Foodborne Illness in the United States, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 8, 2014), <https://www.cdc.gov/foodborneburden/>.

³ John Aloysius Cogan Jr., The Uneasy Case for Food Safety Liability Insurance, 81 BROOK. L. REV. 1495 (2016), <http://brooklynworks.brooklaw.edu/blr/vol81/iss4/9>.

⁴ See, e.g., Tennessee Code § 67-6-301 and Virginia Code § 58.1-1707 (which limits the sales tax exemption to sales under \$1,000).

⁵ Eric Figuero and Samantha Waxman, Which States Tax the Sale of Food for Home Consumption in 2017? CTR. ON BUDGET AND POL. PRIORITIES (Mar. 1, 2017), <https://www.cbpp.org/research/state-budget-and-tax/which-states-tax-the-sale-of-food-for-home-consumption-in-2017>.

⁶ Ohio Revised Code § 5739.02 (B)(2).

⁷ New York doesn't exempt heated foods, candies, soft drinks and similar beverages from the sales tax. See Listings of Taxable and Exempt Foods and Beverages Sold by Food Stores and Similar Establishments, TB-ST-525, NEW YORK STATE DEPT. OF TAXATION AND FINANCE TAXPAYER GUIDANCE DIV. (April , 2011), https://www.tax.ny.gov/pdf/tg_bulletins/sales/b11_525s.pdf.

⁸ In Georgia, for example, all food items are subject to local sales taxes but some food items are not subject to state sales taxes. Resource Guide for Direct-to-Consumer Sales and Agritourism Operations, Sales & Property Taxes, Georgia Farm Bureau (Aug. 2016). http://georgiaagritourism.starchapter.com/images/downloads/Resources/agritourism_tax_resource_guide_1.pdf.

See our other Factsheets in this series for more resources on legal issues in agritourism.