

**Variance from Rule 290-5-14.04(4)(a)(2)**

1. Public Notice with Proposed Variance
2. Current Law
3. Memo requesting variance
4. Info from Georgia Restaurant Association requesting variance
5. Letter from HHS regarding bare hand contact



Brenda Fitzgerald, MD, Commissioner

Nathan Deal, Governor

2 Peachtree St NW, 15th Floor  
Atlanta, Georgia 30303-3142  
[www.health.state.ga.us](http://www.health.state.ga.us)

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## SYNOPSIS OF PROPOSED VARIANCE

### RULES OF DEPARTMENT OF HUMAN SERVICES: PUBLIC HEALTH

#### CHAPTER 290-5-14.04

#### FOOD SERVICE

### NOTICE OF PROPOSED VARIANCE

The Department of Public Health (Department) intends to consider a proposed variance to the current Rules of the Department of Human Services: Public Health 290-5-14.04 Food Services. The Department is authorized to grant a variance or waiver to a rule in the manner prescribed in Chapter 13 of Title 50 of the Official Code of Georgia.

### STATEMENT OF PURPOSE AND MAIN FEATURES OF PROPOSED VARIANCE

The Department of Public Health's Environmental Health Program is proposing a variance from Rule 290-5-14.04(4)(a)(2), with conditions, at the request of the Georgia Restaurant Association, to be considered by the Department's Board, so that employees at all food service establishments that utilize ready-to-eat food ingredients in preparation of their menu items that are cooked to at least 165°F for at least 15 seconds will be allowed to use their bare hands in preparation of the food.

Rule 290-5-14.04 (4)(a)(2) provides that except when washing fruits and vegetables, food employees shall not contact exposed, ready-to-eat food with their bare hands and shall use suitable utensils such as deli tissue, spatulas, tongs, single-use gloves, or dispensing equipment. The Georgia Restaurant Association is requesting a waiver so that employees at all food service establishments that utilize ready-to-eat food ingredients in preparation of their menu items that are cooked to at least 165°F for at least 15 seconds, will be allowed to use their bare hands in preparation of the food.

Pursuant to O.C.G.A. § 50-13-9.1, the Department is authorized to grant a variance or waiver to a rule when a person subject to that rule demonstrates that the purpose of the underlying statute upon which the rule is based can be or has been achieved by other specific means. The Department proposes to grant the variance as it believes that the plan being proposed would provide the same protection from contamination from the food employees' hands.

## SCHEDULE

Interested parties who desire to do so may submit data, views, or arguments concerning the proposed variance in writing to the Department no later than **4:00 p.m. on February 7, 2012**. Comments should be sent to:

Simone Brathwaite  
Associate General Counsel  
Georgia Department of Public Health  
2 Peachtree Street, 15<sup>th</sup> Floor  
Atlanta, Georgia 30303

The Department shall hear public comment and then consider approval of the variance on **February 14, 2012 at 1:00 p.m.** at 2 Peachtree Street N.W., 5<sup>th</sup> Floor Boardroom, Atlanta, Georgia 30303.

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## CURRENT LAW

### 290-5-14-.04 Food. (3) Specifications for Receiving. (k) Molluscan Shellfish, Original Container. 4. (cont.)

(iii) *The labeling information and dates specified under 4(ii) of this subsection are maintained for 90 days ; and*

(iv) *The shellfish are protected from contamination.*

#### (l) Shellstock, Maintaining Identification.

1. Except as specified under 2(ii) of this subsection, shellstock tags shall remain attached to the container in which the shellstock are received until the container is empty.

2. The identity of the source of shellstock that are sold or served shall be maintained by retaining shellstock tags or labels for 90 calendar days from the dates of harvest:

(i) Using an approved record keeping system that keeps the tags or labels in chronological order correlated to the date when, or dates during which, the shellstock are sold or served; and

(ii) If shellstock are removed from their tagged or labeled container:

(I) Preserving source identification by using a record keeping system as specified under 2(i) of this subsection, and

(II) Ensuring that shellstock from one tagged or labeled container are not commingled with shellstock from another container with different certification numbers; different harvest dates; or different growing areas as identified on the tag or label before being ordered by the consumer.

#### (4) Protection From Contamination After Receiving.

##### (a) Preventing Contamination from Hands.

1. Food employees shall wash their hands as specified under Rule .03 subsection (5)(b).

2. *Except when washing fruits and vegetables*, food employees shall not contact exposed, ready-to-eat food with their bare hands and shall use suitable utensils such as deli tissue, spatulas, tongs, single-use gloves, or dispensing equipment. *Fr. 2009 FPA MFC 3-30.11*

3. Food employees shall minimize bare hand and arm contact with exposed food that is not in a ready-to-eat form.

(b) **Preventing Contamination When Tasting.** A food employee may not use a utensil more than once to taste food that is to be sold or served.



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## MEMORANDUM

③ TO: Tamika Z. Matthews, Administrative Assistant  
Legal Department  
Georgia Department of Public Health

FROM: Giles Roberts, Director *Giles F. Roberts*  
Food Service Program  
Environmental Health Branch

DATE: October 31, 2011

RE: Variance from Rule 290-5-14-.04(4) (a) 2 Preventing Contamination from Hands

Attached you will find a variance request from Ms. Karen Bremer, Executive Director of the Georgia Restaurant Association and representative for the Petitioner, Mr. Mark Bergman, concerning the Department's Rules and Regulations Food Service Chapter 290-5-514 and a variance/waiver register outlining the Environmental Health Branch's position on the variance request. The Environmental Health Branch is recommending that the variance be granted with conditions set by the Department as outlined within the variance/waiver registry.

## Rules Variance/Waiver Register

**Chapter Number:** 290-5-14  
**Rule Number:** Rule 290-5-14-.04(4) (a) 2  
**Date:** October 31, 2011  
**Action Requested:** Variance from Rule 290-5-14-.04(4) (a) 2  
Preventing Contamination from Hands  
**Name of Petitioner:** Mark Bergman  
Franchisee of Little Caesar Enterprises, Inc.  
853 Tempest Way NW  
Kennesaw, GA 30152

**Petitioner's Representative:** Karen Bremer, Executive Director  
Georgia Restaurant Association  
3520 Piedmont Road, Suite 130  
Atlanta, GA 30305  
Phone number: 404-467-9000

**Reason for Request:** The Petitioner's Representative states that the usage of gloves in handling pizza toppings adds cost to the pizza chain operations. It is alleged that this cost is several hundred dollars per store per year, to the point where for large chains, the cost for disposable single-use gloves is in several hundred thousand dollars per year, depending of the number of restaurants operated in Georgia. Glove usage also slows the employee wearing the gloves so the time needed to make a pizza is increased.

The Petitioner's Representative cites the Rules and Regulations for Food Service as based on the United States Food and Drug Administration's (FDA) Model Food Code. As such, the Georgia Food Code assumes the same purposes and goals as that of the 2005 FDA Food Code which is to safeguard public health and provide consumers food that is safe. In light of these common public health purposes and goals, it was also cited that the revised version of federal food code, the 2009 FDA Food Code is clear that it intends to allow bare hand contact with ready-to-eat food under specified conditions. Section 3-301.11 of the 2009 Food Code Supplement supports the Petitioner's requests as a safe and adequate method for handling ready-to-eat food ingredients and to protect public health just as does the current Rule and subsection quoted in Chapter 290-5-14. As a proposed alternative to Rule 290-5-14-.04(4) 2, Section ~~2-3-1.11~~ **3-301.11** of the 2009 FDA Model Food Code Supplement is cited as follows:

*(B) Except when washing fruits and vegetables as specified under § 3-302.15 or as specified in ¶ (D) of this section, FOOD EMPLOYEES may not contact exposed, READY-TO-EAT FOOD with their bare hands and shall use suitable UTENSILS such as deli tissue, spatulas, tongs, single-use gloves, or dispensing EQUIPMENT.*

*(D) Paragraph (B) of this section does not apply to a FOOD EMPLOYEE that contacts exposed, ready-to-eat food with bare hands at the time the READY-TO-EAT FOOD is being added as an ingredient to a FOOD that:*

Mark Bergman

Variance from Rule 290-5-14-.04(4) 2 Preventing Contamination from Hands

1. (1) contains a raw animal food and is to be cooked in the FOOD ESTABLISHMENT to heat all parts of the food to the minimum temperatures specified in §§3-401.11(A)-(B) or §3-401.12; or
2. (2) does not contain a raw animal FOOD but is to be cooked in the FOOD ESTABLISHMENT to heat all parts of the FOOD to a temperature of at least 74°C (165°F).

The Petitioner's Representative is asking the variance to apply to all food service establishments in Georgia who utilize ready-to-eat food ingredients in the preparation of their menu items similar to that of the pizza chains. The condition that would apply to their preparation is that the food item containing the ready-to-eat ingredient would be fully cooked to a minimum of 165°F for at least 15 seconds.

**Agency's Decision: GRANT VARIANCE REQUEST WITH CONDITIONS**

**Reason:** The Environmental Health Branch is in support of the Department granting the Petitioner's variance request from Rule 290-5-14-.04(4) 2 Preventing Contamination from Hands to allow bare hand contact with ready-to-eat ingredients as long as certain conditions are observed by the permit holder. This recommendation is based on the fact that it believes the language found within Section 3-301.11 of the 2009 FDA Model Food Code and its Supplement would provide the same protection from contamination from food employee hands as that currently found within Rule 290-5-14-.04 (4) 2 of Chapter 290-5-14. In addition, the Environmental Health Branch is in the process of revising Chapter 290-5-14 to align with provisions found in the 2009 FDA Model Food Code and its Supplement. By doing so, the Department will be adopting the same language as cited in the current FDA Model Food Code. Upon adoption of the revised Chapter 290-5-14 by the Department, this variance, if granted, would no longer be necessary.

Recommended conditions for granting the variance are as follows:

1. Food employees may be allowed to contact exposed ready-to-eat food with bare hands at the time the ready-to-eat food is being added as an ingredient to a food that:
  - a. Contains a raw animal food and is to be cooked in the food establishment to heat all parts of the food to the minimum temperatures specified in subsection (5) of Rule .04 of Chapter 290-5-14; or
  - b. Does not contain a raw animal food but is to be cooked in the food establishment to heat all parts of the food to a temperature of at least 165°F (74°C) for at least 15 seconds.
2. Permit holders will have a written employee health policy that is in full compliance with subsection (4) of Rule .03 in Chapter 290-5-14. The written employee health policy must be on file in each establishment and available for review at the request of the Health Authority.

Mark Bergman

Variance from Rule 290-5-14-.04(4) 2 Preventing Contamination from Hands

3. Permit holders will have a written handwashing policy that complies fully with subsection (5) of Rule .03 in Chapter 290-5-14. The written handwashing policy must be on file in each establishment and available for review at the request of the Health Authority.
4. The Petitioner and/ or the Petitioner's Representative shall report to the Department annually detailing compliance activities with the conditions of this variance. At that time, the Department will determine whether the variance will remain in affect for an additional time period. All incidents involving conditions granted under this variance shall be immediately reported to the Department by the Petitioner, Petitioner's Representative, and/or County Health Department having jurisdiction.

Submitted by: 

Giles Roberts, Program Director  
Food Service Program  
Environmental Health Branch  
Phone: (404) 657-6534  
E-Mail: [gfroberts@dhr.state.ga.us](mailto:gfroberts@dhr.state.ga.us)





## Environmental Health Section

### Request for Variance from the Rules and Regulations Food Service Chapter 290-5-14

(4)  
**1. Petitioner**

Name: Mark Bergman, a franchisee of LittleCaesar Enterprises, Inc.

Address: 853 Tempest Way NW, Kennesaw, GA 30152

Phone number: 208-808-9243

Contact person, if other than petitioner: Karen Bremer

Attorney or other person representing petitioner:

Name: Karen Bremer, Executive Director, Georgia Restaurant Association - on behalf the foodservice industry serving ready-to-eat foods that are further fully cooked to 165°F, for example, pizza

Address: 3520 Piedmont Road, Suite 130, Atlanta, GA 30305

Phone number: 404-467-9000

**2. Rule(s) from which a variance is requested (list each separately):**

Rules and Regulations Food Service (Georgia Food Code) Chapter 290-5-14-.04 (4) (a) 2

**3. List the specific facts of substantial hardship which would justify a variance for petitioner. Note: address each Rule for which a variance is being requested.**

The usage of gloves in handling pizza toppings adds cost to the operations. This cost is several hundred dollars per store per year, so for large chains the cost in several hundred thousand dollars per year, depending of the number of restaurants operated in Georgia. Glove usage also slows the employee wearing the gloves so the time needed to make a pizza is increased.



**Request for Variance from the  
Rules and Regulations Food Service Chapter 290-5-14**

**4. Detail the alternative standards petitioner agrees to meet for each Rule listed for variance in item #2 above.**

*Note: If required by the Georgia Food Service Rules and Regulations Chapter 290-5-14, attach HACCP plan along with associated documents – See Rule 290-5-14-.02 subsection (5) (a) through (e). Also, attach any challenge or inoculation studies that support submitted HACCP plan.*

**2009 Model Food Code, Supplement to the 2009 Food Code**

**3-301.11**

Added new ¶(D) to specify that the prohibition of bare hand contact with ready-to-eat foods does not apply to the handling of ready-to-eat foods as they are being added as ingredients to a food that is to be cooked in the food establishment to a minimum temperature specified in the Code.

**FDA Food Code Text:**

*(B) Except when washing fruits and vegetables as specified under § 3-302.15 or as specified in ¶ (D) of this section, FOOD EMPLOYEES may not contact exposed, READY-TO-EAT FOOD with their bare hands and shall use suitable UTENSILS such as deli tissue, spatulas, tongs, single-use gloves, or dispensing EQUIPMENT.*

*(D) Paragraph (B) of this section does not apply to a FOOD EMPLOYEE that contacts exposed, ready-to-eat food with bare hands at the time the READY-TO-EAT FOOD is being added as an ingredient to a FOOD that:*

- 1. (1) contains a raw animal food and is to be cooked in the FOOD ESTABLISHMENT to heat all parts of the food to the minimum temperatures specified in ¶¶3-401.11(A)-(B) or §3-401.12; or*
- 2. (2) does not contain a raw animal FOOD but is to be cooked in the FOOD ESTABLISHMENT to heat all parts of the FOOD to a temperature of at least 74°C (165°F).*

**5. List the reasons that such alternative standards would afford adequate protection for the public health, safety, and welfare. Address each listed Rule in item #2 above.**

Please see *Attachment A* – September 22, 2011 letter from Mr. Kevin Smith, Director, Retail Food and Cooperative Programs, Office of Food Safety, Center for Food Safety and Applied Nutrition, Food and Drug Administration to Mr. Dan Roehl, Public Affairs Specialist, National Restaurant Association



**6. List the reasons the variance requested would serve the purpose of the underlying statute upon which each Rule listed in item #2 above is based.**

As stated in the *Interpretation Manual for Georgia Rules and Regulations Food Service Chapter 290-5-14*, the Rules and Regulations for Food Service “are based on the United States Food and Drug Administration’s (FDA) Model Food Code. In doing so, the Georgia Food Code assumes the same purposes and goals as that of the 2005 FDA Food Code which is to safeguard public health and provide consumers food that is safe.” Although the current Georgia Food Code is based on the 2005 FDA Food Code, it is clear that FDA considers the practice, as stated in 3-301.11 of the 2009 Food Code Supplement, to be safe and adequately protect public health.

The rationale in the Supplement to the 2009 FDA Food Code for this change in section 3-301.11 states:

*If a ready-to-eat food is being added as an ingredient to a food item that is subsequently subjected to a pathogen kill step (such as adding cheese or other ready-to-eat toppings to a pizza dough or adding vegetables to a raw meat dish before cooking) then strict prohibition of bare hand contact is not necessary. Cooking foods to the temperatures required in the Food Code will reduce the likelihood of survival of pathogens that might be transferred from an employee’s hands to the surface of the ready-to-eat foods. The exception specifically targets bare hand contact with ready-to-eat food at the time it is added as an ingredient to food that will be cooked in the food establishment to the minimum temperatures specified in the Food Code.*

*When proper heat treatment is used in combination with the exclusion/restriction of ill food workers and proper handwashing, the proper heat treatment provides an additional means of interrupting disease transmission.*

**7. Duration of variance requested:**

Until such time that the State of Georgia adopts section 3-301.11 (D) of the 2009 FDA Food Code Supplement. At that time, the process described in the 2009 Supplement to the FDA Food Code will meet Georgia regulatory requirements.



Brenda Fitzgerald, MD, Commissioner

Nathan Deal, Governor

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Attachment A



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration  
College Park, MD 20740

SEP 22 2011

5  
Mr. Dan Roehl  
Public Affairs Specialist  
National Restaurant Association  
1200 Seventeenth St. NW  
Washington, D.C., 20038-3097

Dear Mr. Roehl:

I am writing to provide you an update on FDA activities related to the acceptability of bare hand contact with ready-to-eat foods in foodservice and other retail food establishments. Your May 19, 2011 letter addressed to me summarized our previous discussions and meetings on the matter. FDA has taken steps to promote better understanding of the recommendations contained in the FDA Food Code on this subject.

Prior to and since the 2010 biennial meeting of the Conference for Food Protection, CFSAN has given significant consideration to the prohibition of bare hand contact with ready-to-eat foods as recommended in the FDA Food Code. As you indicated in your letter, the 2010 CFP recommended that FDA modify the Food Code to allow for bare hand contact with RTE food ingredients used in food products that are subsequently fully cooked or reheated.

In the coming days, FDA will be issuing a Supplement to the 2009 Food Code to address use of bare hand contact with ready-to-eat ingredients added to foods that are subsequently cooked and several other recommendations made by the CFP. A letter was recently sent by Mr. Michael Landa, Acting Director, CFSAN to the Conference for Food Protection that outlines, in general terms, how the Supplement will address various CFP recommendations. The following is an excerpt from that letter that speaks to how the Supplement will modify the Food Code to address the CFP recommendation related to bare hand contact with ready-to-eat foods:

*"The Supplement specifies that the prohibition of bare hand contact with ready-to-eat foods does not apply to the handling of foods as they are being added as ingredients to a food that is to be cooked in the food establishment to a minimum temperature specified in the Code. FDA believes this is consistent with the intent of the CFP Recommendation and the way many jurisdictions have interpreted the current prohibition of bare hand contact with ready-to-eat foods. The terms "fully cooked" and "reheated" were not incorporated into the Supplement as recommended by the CFP because those terms are not defined in the Food Code and their meaning may not be fully understood by users of the Code. To ensure consistent control of the hazards associated with bare hand contact with ready-to-eat foods, FDA believes it is necessary to specify the minimum temperatures to which foods must be heated if the prohibition of bare hand contact is not to apply."*



Page 2 – Mr. Dan Rochl:

To elaborate, the Supplement to the 2009 Food Code will indicate that the exception to the prohibition of bare hand contact applies when ready-to-eat foods are being added as ingredients to a food that will be heated in the establishment to a minimum of 165 °F or, in the case of ready-to-eat ingredients being added to a food that contains a raw animal food, to the minimum cooking temperatures already specified in the Food Code for raw animal foods.

Your inquiry focused on concerns of your members that the Food Code provisions were not consistently applied as they relate to the handling of ready-to-eat ingredients while making pizzas that are to undergo a full cooking step in the food establishment. The revisions contained in the Supplement to the 2009 Food Code should provide clarity regarding the conditions under which it is deemed acceptable to handle such ingredients without the use of barriers to bare hand contact such as gloves or utensils.

As you know, FDA recognizes state and local governments as having primary responsibility for the regulation of restaurants and other retail food establishments. These agencies license, inspect, and enforce their own food statutes, regulations, and ordinances most of which are based on the FDA Food Code. FDA serves in an advisory role and provides guidance based on the Food Code and Title 21, Code of Federal Regulations. The relevance of the recommendations described in this correspondence to any given food establishment depends on the extent to which the agency having jurisdictions adopts or otherwise implements such recommendations into regulation or policy.

I respectfully request that you share this response with the representatives of each of the member companies who have been involved in the discussion of this issue and who were copied on your letter to me. If you have any questions regarding this matter, please don't hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Kevin Smith".

Kevin Smith, MPH  
Director, Retail Food and Cooperative Programs  
Coordination Staff, Office of Food Safety  
Center for Food Safety and Applied Nutrition

cc: J. Reardon, ORA  
N. Beru, CFSAN