

Food and Food Ingredients Related Statutory Information (effective October 1, 2009)

Statutory Exemption for Food and Food Ingredients

77.54(20n)(a) – An exemption from Wisconsin sales and use tax is provided for “The sales price from the sale of and the storage, use, or other consumption of food and food ingredients, **except** candy, soft drinks, dietary supplements, and prepared food.”

Related Definitions

"Food and food ingredient" means a substance in liquid, concentrated, solid, frozen, dried, or dehydrated form, that is sold for ingestion, or for chewing, by humans and that is ingested or chewed for its taste or nutritional value. "Food and food ingredient" does not include alcoholic beverages or tobacco.

"Alcoholic beverage" means a beverage that is suitable for human consumption and that contains 0.5 percent or more of alcohol by volume.

"Candy" means a preparation of sugar, honey, or other natural or artificial sweetener combined with chocolate, fruit, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces. "Candy" does not include a preparation that contains flour or that requires refrigeration.

"Dietary supplement" means a product, other than tobacco, that is intended to supplement a person's diet, if all of the following apply:

- (a) The product contains any of the following ingredients or any combination of any of the following ingredients:
 1. A vitamin.
 2. A mineral.
 3. An herb or other botanical.
 4. An amino acid.
 5. A dietary substance that is intended for human consumption to supplement the diet by increasing total dietary intake.
 6. A concentrate, metabolite, constituent, or extract.
- (b) The product is intended for ingestion in tablet, capsule, powder, soft-gel, gel-cap, or liquid form, or, if not intended for ingestion in such forms, is not represented as conventional food and is not represented for use as the sole item of a meal or diet.
- (c) The product is required to be labeled as a dietary supplement as required under 21 CFR 101.36.

"Prepared food" means:

1. Food and food ingredients sold in a heated state.
2. Food and food ingredients heated by the retailer, except as provided in par. (b).
3. Food and food ingredients sold with eating utensils that are provided by the retailer of the food and food ingredients, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. In this subdivision, "plate" does not include a container or packaging used to transport food and food ingredients. For purposes of this subdivision, a retailer provides utensils if any of the following applies:

- a. The utensils are available to purchasers and the retailer's sales of prepared food under subds. 1. and 2., soft drinks, and alcoholic beverages at an establishment are more than 75 percent of the retailer's total sales at that establishment, as determined under par. (c).
 - b. For retailers not described under subd. 3. a., the retailer's customary practice is to physically give or hand the utensils to the purchaser, except that plates, glasses, or cups that are necessary for the purchaser to receive the food and food ingredients need only be made available to the purchaser.
4. Except as provided in par. (b), 2 or more food ingredients mixed or combined by a retailer for sale as a single item.

(b) "Prepared food" does not include:

1. For purposes of par. (a) 2. and 4., 2 or more food ingredients mixed or combined by a retailer for sale as a single item, if the retailer's primary classification in the North American Industry Classification System, 2002 edition, published by the federal office of management and budget, is manufacturing under subsector 311, not including bakeries and tortilla manufacturing under industry group number 3118.
2. For purposes of par. (a) 2. and 4., 2 or more food ingredients mixed or combined by a retailer for sale as a single item, sold unheated, and sold by volume or weight.
3. For purposes of par. (a) 2. and 4., bakery items made by a retailer, including breads, rolls, pastries, buns, biscuits, bagels, croissants, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.
4. For purposes of par. (a) 4., food and food ingredients that are only sliced, repackaged, or pasteurized by a retailer.
5. For purposes of par. (a) 4., eggs, fish, meat, and poultry, and foods containing any of them in raw form, that require cooking by the consumer, as recommended by the food and drug administration in chapter 3, part 401.11 of its food code to prevent food-borne illnesses.

(c) 1. The percentage specified under par. (a) 3. a. shall be determined using the following:

- a. A numerator that includes sales of prepared food, as defined in par. (a) 1., 2., and 4., and food for which plates, bowls, glasses, or cups are necessary to receive the food, but not including alcoholic beverages.
 - b. A denominator that includes all food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks, but not including alcoholic beverages.
2. a. If the percentage determined under subd. 1. is 75 percent or less, utensils are considered to be provided by the retailer if the retailer's customary practice is to physically give or hand the utensils to the purchaser or, in the case of plates, bowls, glasses, or cups that are necessary to receive the food, to make such items available to the purchaser.

- b. If the percentage determined under subd. 1. is greater than 75 percent, utensils are considered to be provided by the retailer if the utensils are made available to the purchaser.
3. For a retailer whose percentage determined under subd. 1. is greater than 75 percent, an item sold by the retailer that contains 4 or more servings packaged as one item and sold for a single price does not become prepared food simply because the retailer makes utensils available to the purchaser of the item, but does become prepared food if the retailer physically gives or hands utensils to the purchaser of the item, except that plates, bowls, glasses, or cups necessary for the purchaser to receive the food need only be made available to the purchaser. For purposes of this subdivision 3., serving sizes are based on the information contained on the label of each item sold, except that, if the item has no label, the serving size is based on the retailer's reasonable determination.
4.
 - a. Except as provided in subd. 4. b., if a retailer sells food items that have a utensil placed in a package by a person other than the retailer, the utensils are considered to be provided by the retailer.
 - b. Except as provided in subds. 2. and 3., if a retailer sells food items that have a utensil placed in a package by a person other than the retailer and the person's primary classification in the North American Industry Classification System, 2002 edition, published by the federal office of management and budget, is manufacturing under subsector 311, the utensils are not considered to be provided by the retailer.
5. For purposes of par. (a) 3., a retailer shall determine the percentage for the retailer's tax year or business fiscal year, based on the retailer's data from the retailer's prior tax year or business fiscal year, as soon as practical after the retailer's accounting records are available, but not later than 90 days after the day on which the retailer's tax year or business fiscal year begins. For a retailer with more than one establishment in this state, a single determination under subd. 1. that combines the information for all of the retailer's establishments in this state shall be made annually, as provided in this subdivision, and apply to each of the retailer's establishments in this state. A retailer that has no prior tax year or business fiscal year shall make a good faith estimate of its percentage for purposes of par. (a) 3. for the retailer's first tax year or business fiscal year and shall adjust the estimate prospectively after the first 3 months of the retailer's operations if the actual percentage is materially different from the estimated percentage.

"Soft drink" means a beverage that contains less than 0.5 percent of alcohol and that contains natural or artificial sweeteners. "Soft drink" does not include a beverage that contains milk or milk products; soy, rice, or similar milk substitutes; or more than 50 percent vegetable or fruit juice by volume.

"Tobacco" means cigarettes, cigars, chewing tobacco, pipe tobacco, and any other item that contains tobacco.

Examples of Current Food Exemptions Compared With Exemptions Under Streamlined

Food Item	Current Treatment	Streamlined Treatment (Effective 10/1/2009)
Bakery products sold by bakeries and grocery stores	Exempt, unless for consumption on seller's premises or heated	Exempt, unless provided with utensils (plates, forks, knives, etc.) or sold heated
Bottled tea, sweetened	Exempt	Taxable
Bottled water, carbonated, non-sweetened	Taxable	Exempt
Candy containing flour (e.g., Kit Kat, Twix, Licorice)	Taxable	Exempt
Chocolate chips	Exempt	Taxable
Deli combination platters prepared by seller	Exempt, unless a meal or sandwich	Exempt if sold by weight or volume, unless provided with utensils or sold heated
Deli food sold by weight (e.g., potato salad, fruit salad, sliced deli meat)	Exempt, unless for consumption on the seller's premises	Exempt unless provided with utensils (plates, forks, knives, etc.) or sold heated
Deli salad bar (self-service, utensils provided)	Taxable, if for on premises consumption	Taxable
Frozen fruit juice	Exempt, except if less than 100% juice	Exempt
Ice cream novelties (e.g., ice cream cone, Popsicle)	Taxable	Exempt, unless prepared by retailer and retailer is not primarily a manufacturer and not sold by weight or volume
Liquid 51% - 99% fruit juice	Taxable	Exempt
Manufactured food sold at manufacturer's (seller's) outlet (for consumption off the premises)	Exempt, unless sandwich, ready to eat meal, candy, soft drink, dietary supplement, popcorn, or alcohol beverage	Exempt, unless utensils provided, candy, soft drink, dietary supplement, or alcoholic beverage or sold heated
Marshmallows	Exempt	Taxable
Nonalcoholic beer	Taxable	Exempt, unless sweetened
Nonalcoholic champagne	Taxable (fruit drink not 100% juice)	Exempt, unless sweetened
Popcorn, popped	Taxable	Exempt, unless candy, sold heated or prepared by retailer, retailer is not primarily a manufacturer, and not sold by weight or volume
Popcorn, unpopped	Taxable	Exempt
Powdered fruit drinks	Taxable	Exempt
Rotisserie chicken (sold heated)	Taxable	Taxable
Sandwich prepared by grocer not sold by weight or volume	Taxable, unless frozen	Taxable