

**§ 105-164.4L. Prepared food.**

(a) Prepared Food Definition. – The term "prepared food" means food that meets at least one of the following conditions:

- (1) It is sold in a heated state, or it is heated by the retailer.
- (2) It consists of two or more foods mixed or combined by the retailer for sale as a single item. This does not include:
  - a. Food containing raw eggs, fish, meat, or poultry that requires cooking by the consumer as recommended by the Food and Drug Administration in chapter 3, part 401.11 of its Food Code so as to prevent foodborne illnesses.
  - b. Food that is only sliced, repackaged, or pasteurized by the retailer.
- (3) It is sold with eating utensils provided by the retailer, such as plates, knives, forks, spoons, glasses, cups, napkins, and straws. A plate does not include a container or packaging used to transport the food. An eating utensil placed in a package with the food items by a person other than the retailer, if that other person's NAICS classification code is that of a manufacturer, sector 311, is not treated as an eating utensil provided by the retailer. For a packager with any other NAICS classification code, the retailer is considered to have provided the eating utensil.

(b) Utensils Provided by the Retailer. – Based on a retailer's prepared food sales percentage, determined in accordance with subsection (c) of this section, the phrase "provided by the retailer," as described in subdivision (3) of subsection (a) of this section, has the following meanings:

- (1) Sales percentage of greater than seventy-five percent (75%). – If a retailer has a prepared food sales percentage of greater than seventy-five percent (75%), "provided by the retailer" means the retailer makes eating utensils available to purchasers, except that an item sold by the retailer containing four or more servings packaged as one item and sold for a single price does not become prepared food because the retailer makes utensils available to the purchaser of the item, but is prepared food if the retailer physically gives or hands utensils to the purchaser of the item. Serving sizes are determined based on the label of an item sold. If no label is available, a retailer must reasonably determine the number of servings in an item.
- (2) Sales percentage of seventy-five percent (75%) or less. – If a retailer has a prepared food sales percentage of seventy-five percent (75%) or less, "provided by the retailer" means the retailer's business practice is to physically give or hand eating utensils to purchasers, except that plates, bowls, glasses, and cups necessary for the purchaser to receive the food need only be made available to purchasers.

(c) Prepared Food Sales Percentage. –

- (1) Definition. – A percentage determined by dividing the following described numerator by the following described denominator:
  - a. The numerator is the retailer's annual sales of prepared food described in subdivisions (1) and (2) of subsection (a) of this section and food sold when plates, bowls, glasses, or cups are necessary to receive the food. The numerator shall not include alcoholic beverages or food excluded from prepared food.
  - b. The denominator is the retailer's total annual sales of all food and prepared food, excluding alcoholic beverages.
- (2) Administration of definition. –

- a. A retailer must calculate the prepared food sales percentage for each tax year or business fiscal year based on the retailer's data from the prior tax year or business fiscal year, as soon as possible after accounting records are available, but not later than 90 days after the beginning of the retailer's tax year or business fiscal year.
- b. A single prepared food sales percentage shall be determined annually for all of the retailer's establishments in this State.
- c. A new retailer shall make a good-faith estimate of its prepared food sales percentage for its first year in business. The new retailer must adjust its good-faith estimate prospectively after the first three months of its business operation if actual prepared food sales percentages materially affect the seventy-five percent (75%) threshold described in subsection (b) of this section. (2023-12, s. 2.1(b).)