

**APPROVED REGULATION OF THE
NEVADA TAX COMMISSION**

LCB File No. R056-18

Filed June 8, 2020

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §§1-3, NRS 360.090, 360B.110, 372.284 and 372.725.

A REGULATION relating to taxation; revising provisions governing the determination of whether food sold by a retailer is prepared food intended for immediate consumption for the purposes of the imposition of sales and use taxes on the retail sale of the food; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Existing law generally exempts food for human consumption from sales and use taxes in this State. However, existing law excludes from this exemption, and imposes sales and use taxes on, prepared food intended for immediate consumption. (Nev. Const. Art. 10, § 3[A]; NRS 372.284, 374.289) Existing law and regulations define prepared food to include food sold with eating utensils provided by the seller. (NRS 360B.460; NAC 372.605) **Section 1** of this regulation describes the circumstances under which food is deemed to be sold with eating utensils provided by the seller, a determination which is made based on the percentage of food sold by the seller that is prepared food. **Section 1** also establishes the method for calculating the percentage of prepared food sold by the seller and requires a seller who sells or intends to sell prepared food from multiple establishments to calculate the percentage of prepared food for every such establishment and use the average of those calculations as the percentage of prepared food that the seller has sold or will sell. **Section 2** of this regulation excludes certain items containing four or more servings per container from the definition of “prepared food intended for immediate consumption,” as that term is interpreted by the Department of Taxation.

Section 3 of this regulation requires certain sellers who sold prepared food prior to the effective date of this regulation to calculate the percentage of prepared food sold by the seller in accordance with the method established by **section 1** not later than 90 days after the effective date of this regulation. **Section 3** provides that certain provisions of this regulation relating to when food is deemed to be sold with eating utensils will not be enforced by the Department until 90 days after the effective date of this regulation.

Section 1. Chapter 372 of NAC is hereby amended by adding thereto a new section to read as follows:

For the purpose of determining whether food sold at retail by a seller is a food sold with eating utensils provided by the seller pursuant to subsection 3 of NRS 360B.460 and NAC 372.605:

1. Except as otherwise provided in subsection 2, a seller who made retail sales of prepared food during a tax year or business fiscal year, whichever is selected by the seller, as soon as practicable after accounting records for that tax year or business fiscal year, as applicable, are available to the seller but not later than 90 days after the beginning of the seller's next tax year or business fiscal year, as applicable, shall calculate a percentage by:

(a) Calculating the sum of:

(1) The total dollar value of all retail sales of food which is described in subsection 1 of NRS 360B.460 and which was sold at retail by the seller during the immediately preceding tax year or business fiscal year, as applicable;

(2) The total dollar value of all retail sales of food which is described in subsection 2 of NRS 360B.460 and which was sold at retail by the seller during the immediately preceding tax year or business fiscal year, as applicable; and

(3) The total dollar value of all retail sales of food which is incapable of being transferred to the purchaser without the use of a plate, bowl, glass or cup, including, without limitation, soft drinks dispensed from a fountain and food dispensed at a salad bar, and which was sold at retail by the seller during the immediately preceding tax year or business fiscal year, as applicable; and

(b) Dividing the amount calculated pursuant to paragraph (a) by the total dollar value of all retail sales of food by the seller, including, without limitation, prepared food, candy, soft drinks and dietary supplements.

↪ *If, during a tax year or business fiscal year, as applicable, a seller made retail sales of any type of food described in paragraph (a) at more than one establishment, the seller must perform the calculation required by this subsection for each establishment and, for the purposes of this section, use the average of those calculations as the percentage of the seller's sales of food that were sales of prepared food.*

2. If a seller did not make any retail sales of prepared food during the immediately preceding tax year or business fiscal year, whichever is selected by the seller, or is a new business and the seller intends to make retail sales of prepared food during the seller's current tax year or business fiscal year, the seller must calculate a percentage by:

(a) Calculating the sum of:

(1) An estimate of the total dollar value of all retail sales of food which is described in subsection 1 of NRS 360B.460 and which the seller expects to sell at retail during the current tax year or business fiscal year, as applicable;

(2) An estimate of the total dollar value of all retail sales of food which is described in subsection 2 of NRS 360B.460 and which the seller expects to sell at retail during the current tax year or business fiscal year, as applicable; and

(3) An estimate of the total dollar value of all retail sales of food which is incapable of being transferred to the purchaser without the use of a plate, bowl, glass or cup, including, without limitation, soft drinks dispensed from a fountain and food dispensed at a salad bar, and which the seller expects to sell during the current tax year or business fiscal year, as applicable; and

(b) Dividing the amount calculated pursuant to paragraph (a) by an estimate of the total dollar value of all retail sales of food, including, without limitation, prepared food, candy, soft

drinks and dietary supplements, which the seller expects to make during the current tax year or business fiscal year, as applicable.

↪ If a seller described in this subsection intends to make retail sales of any type of food described in paragraph (a) at more than one establishment, the seller must perform the calculation required by this subsection for each such establishment and, for the purposes of this section, use the average of those calculations as the percentage of the seller's sales of food that will be sales of prepared food. If the actual retail sales of prepared food by a seller described in this subsection during the first three months of such sales materially affect the calculation required by this subsection, the seller must perform the calculation required by this subsection using reasonable revised estimates and, for the purposes of this section, use that calculation as the percentage of the seller's sales of food that will be sales of prepared food.

3. If the percentage calculated by a seller pursuant to subsection 1 or 2, as applicable, is 75 percent or less, food sold at retail by the seller is deemed to be food sold with eating utensils provided by the seller:

(a) If the practice of the seller for sales of that food, as represented by the seller, is to directly give or hand a utensil to the purchaser to use to consume the food being sold; or

(b) If the food being sold is incapable of being transferred without the use of a plate, bowl, glass or cup and the practice of the seller, as represented by the seller, is to make plates, bowls, glasses or cups available to the purchaser of such food, including, without limitation, by permitting a purchaser to obtain such plates, bowls, glasses or cups at a kiosk or common area.

4. If the percentage calculated by a seller pursuant to subsection 1 or 2, as applicable, is more than 75 percent, food sold at retail by the seller is deemed to be food sold with eating utensils provided by the seller if the seller:

(a) Directly gives or hands a utensil to the purchaser to use to consume the food being sold; or

(b) Makes utensils available to the purchaser, including, without limitation, by permitting the purchaser to obtain utensils at a kiosk or common area.

5. A seller who makes retail sales of prepared food shall maintain records in accordance with NRS 372.735 which are adequate to substantiate the calculations made by the seller pursuant to this section.

Sec. 2. NAC 372.605 is hereby amended to read as follows:

372.605 1. As used in NRS 372.284, the Department will interpret the term “prepared food intended for immediate consumption” to:

(a) Mean prepared food, as defined in NRS 360B.460, which is *deemed to be* intended for immediate consumption. *Subsections 1, 2 and 3 of NRS 360B.460 each describe a separate type of prepared food.*

(b) Exclude, if sold without eating utensils provided by the seller:

(1) Two or more food ingredients mixed or combined by the seller for sale as a single item and sold:

(I) By a seller whose primary NAICS classification is within Subsector 311, Food Manufacturing; or

(II) In an unheated state by weight or volume as a single item.

(2) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish pastries, cakes, tortes, pies, tarts, muffins, bars, cookies and tortillas.

(c) Exclude food sold as a single item which, according to the nutrition labeling information required by 21 C.F.R. § 101.9, contains four or more servings per container, if the seller maintains records of each such sale as are required by the Department pursuant to NRS 372.735.

2. For the purposes of this section, “NAICS classification” means classification under the *North American Industry Classification System*, 2007 Edition, which is hereby adopted by reference. A copy of that publication is available, ~~{from the National Technical Information Service, Alexandria, Virginia 22312, or by telephone at (703) 605-6000 or (800) 553-6847, for the price of \$59. A copy of that publication is also available,}~~ free of charge, from the U.S. Census Bureau at the Internet address <http://www.census.gov/eos/www/naics/index.html>.

Sec. 3. This regulation, LCB File No. R056-18, is hereby amended by adding thereto the following transitory language which has the force and effect of law but which will not be codified in the Nevada Administrative Code:

1. Notwithstanding the provisions of section 1 of this regulation, a seller who made retail sales of prepared food during the tax year or business fiscal year, whichever is selected by the seller, immediately preceding the tax year or business fiscal year, as applicable, in which this regulation becomes effective shall, not later than 90 days after the date on which this regulation becomes effective, perform the calculation required by subsection 1 of section 1 of this regulation.

2. The Department of Taxation will enforce the provisions of subsections 3 and 4 of section 1 of this regulation beginning 90 days after the date on which this regulation becomes effective.

The Department will not enforce the provisions of subsections 3 and 4 of section 1 of this regulation prior to that date.

3. The Department shall post notice of:

(a) The date by which a seller who made retail sales of prepared food during the tax year or business fiscal year, whichever is selected by the seller, is required to make the initial calculation required by subsection 1 of section 1 of this regulation; and

(b) The date on which the Department is required to begin enforcing the provisions of subsections 3 and 4 of section 1 of this regulation pursuant to subsection 2,

↪ on the Internet website of the Department and make such other efforts to notify sellers of those dates as the Executive Director of the Department deems appropriate. The failure of a seller to receive notice of the dates pursuant to this subsection does not exclude the seller from compliance with any requirement relating to the imposition, collection and remittance of sales and use taxes.