

***NJ FOOD COUNCIL REPORT***

***TO***

***THE NJ RED TAPE REVIEW GROUP***

*MARCH 2010*

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## **WHO IS THE NEW JERSEY FOOD COUNCIL?**

The New Jersey Food Council is a Trenton-based, business trade association which represents the interests of the retail food distribution industry in New Jersey. NJFC members are comprised of the major supermarket and convenience store chains with operations in New Jersey. Food retail members include Shop Rite, Whole Foods, WaWa, Quick Chek, etc., as well as food manufacturing companies such as Campbell Soup, Kraft, and Unilever, that supply these stores with product. NJFC members employ almost 250,000 people and feed approximately 9 million residents daily. The supermarket industry is the anchor of most communities, has a track record of being excellent corporate citizens and gives back to the communities they serve in a variety of ways.

The NJFC offices are located at 30 West Lafayette Street, Trenton and can be contacted at (609) 392-8899 or [njfc@njfoodcouncil.com](mailto:njfc@njfoodcouncil.com) for more information.

## **Rules & Regulations in Need of Reform**

NJFC has outlined six (6) areas which need regulatory reform. Below is the list and background information as to why NJFC and its members support each proposed change.

### **1. Unfair Cigarette Sales Tax**

In 1948, New Jersey adopted the “Cigarette Tax Act” (P.L.1948, c.65) for the imposition of a tax on the sale, possession for sale, use, consumption or storage for use of cigarettes within the State and for the licensing of manufacturers, manufacturers’ representatives, distributors, dealers and consumers. The Act also provided for the control of the transportation of cigarettes in and through the State.

In 1952, New Jersey adopted the “Unfair Cigarette Sales Act of 1952” (P.L.1952, c.247) in order to prevent unfair competition and unfair trade practices in the sale of cigarettes; to prohibit sales of cigarettes below cost, and; to protect and stabilize the collection of taxes on the sale of cigarettes and revenues from the licensing of persons engaged in the sale of cigarettes.

New Jersey’s courts have ruled that these two Acts disclose the Legislature’s intent to deal with a state-wide problem and to protect general welfare of all citizens of state from various misuses in sale and distribution of cigarettes; regulation of those who distribute and sell cigarettes throughout the state requires uniform, centralized treatment which the Acts are intended to provide. Coast Cigarettes Sales, Inc. v. Mayor and City Council of City of Long Branch, 121 NJ Super. 439 (1972).

NJFC members do not argue with the intent of the Cigarette Tax Act and Unfair Cigarette Sales Act of 1952, however, a newly adopted rule strays from these intentions and circumvents the understanding that a business charge sales tax on the price of an item sold. In this instance, the item is cigarettes.

New Jersey prohibits the sale of cigarettes below the minimum price set by the State. This arbitrary minimum price does not account for promotions/discounts, etc. that retailers routinely receive from cigarette manufacturers which effectively lower the price paid by the retailer for these cigarettes. Retailers pass this savings on to the consumer, collect the requisite sales tax on the amount paid by the consumer and remit said tax to the NJ Division of Taxation.

On December 7, 2009, the NJ Division of Taxation adopted a new rule, N.J.A.C. 18:6-3.4, which effectively forces cigarette retailers to submit sales

tax revenues based on the arbitrary minimum cigarette prices set by the State of New Jersey and not the actual price paid by the consumer. What this change does is force retailers to subsidize the consumers that choose to purchase cigarettes by remitting the extra sales tax required if the price is below the arbitrary State minimum price.

In the alternative, retailers might attempt to advertise the discounted price but charge consumers sales tax based on the minimum price. This would cause massive confusion to the consumer and would be an administrative nightmare for the retailer and the State Division of Taxation.

For the above reasons, NJFC members believe that the newly adopted rule, N.J.A.C. 18:6-3.4 should be eliminated.

## **2. Motor Fuel Rebates/ Coupons**

In 1938, New Jersey adopted an Act, P.L.1938, c.163, to regulate the retail sale of motor fuels and provide penalties for violations of said Act. To enforce this Act, rules were adopted which prohibit rebates, allowances, concessions or benefits shall be given, directly or indirectly, so as to permit any person to obtain motor fuels from a retail dealer below the posted price. (N.J.A.C.18:19-2.3(c)). This rule was amended to grant an exception to those credits earned through purchases on a credit card which may be utilized by a person to receive a rebate in the purchase of motor fuels.

NJFC members would request a further amendment of this section of the rule to include the use of debit cards and customer loyalty cards as exceptions to the rule. As defined in this section, a debit card is any general-purpose card or other device issued or approved for use by a financial institution for use in debiting a cardholder's account for the purpose of that cardholder obtaining goods or services, whether authorization is signature-based or PIN-based. A loyalty card would be defined as customers' plastic store cards used to reward frequent shoppers and to collect data on purchasing habits. Both of these cards may be used to collect "points" similar to a traditional credit card thereby entitling customers to a rebate in the purchase of motor fuels at participating retail fuel dealers.

Also included in the below-cost fuel sales rule is a provision which prohibits the giving of "gifts" with fuel purchases. (N.J.A.C. 18:19-2.8 (a)). This rule prohibits a fuel dealer from giving away anything if said "give away" is conditioned upon the purchase of motor fuel. This prohibition encompasses the use of coupons which entitle the customer to a discount on the purchase of merchandise, not fuel. There is no correlation between the use of coupons and selling fuel below-cost in violation of the current statute. Simply by placing a coupon, i.e., 1 free soda, 1 free bag of chips, etc, on the back of a receipt

received when purchasing fuel, should not be held in the same regard as selling fuel \$1.00 below what it cost the business. There is a difference and NJFC believes the rule should be changed to allow coupons on the back of fuel receipts.

### 3. Milk Coupons

Since the Great Depression, the federal government and approximately three quarters of the states have enacted some form of milk pricing regulation. At that time, the demand for milk dropped precipitously and farmers found themselves in great economic distress. Since milk is an important commodity, federal and state milk marketing orders were developed to stabilize the market and ensure that farmers and producers receive a reasonable return and are able to continue supplying milk for public consumption. Many state regulations took marketing controls a step further and fixed wholesale and retail prices. While many states retain the authority to control milk markets, this regulation has declined significantly over the last decade.

NJFC understands that the dairy industry remains a vital part of New Jersey agriculture. It is important to maintain a healthy industry to provide New Jersey citizens with fresh, wholesome milk. It is also important to encourage retailers to make this important commodity available to consumers at reasonable prices. New Jersey is one of the few states that continues to regulate minimum retail prices for milk. In connection with this regulation, New Jersey is among only 11 states that restrict the use of discount coupons in retail promotional and marketing campaigns. (See N.J.A.C. 2:48-4.1) Such regulation fails to protect dairy farmers in any significant way, and may contribute to higher prices for consumers. While it may be important to ensure minimum prices at the producer, dealer and processor levels to maintain a stable market, retailers should be free to make a business decision regarding the promotion and marketing of their products to consumers. Allowing milk coupons does not change the price fixing authority of the Division of Marketing and Development within the Department of Agriculture.

Furthermore, within the same subchapter of the NJ Administrative Code which prohibits milk coupons for retailers are two other sections which expressly authorize milk coupons for other entities. N.J.A.C. 2:48-4.2, titled "Unlimited use of coupons by National Dairy Promotion Board permitted", expressly allows for the National Dairy Promotion Board of any state dairy promotion council to offer "cents off" or "refund" coupons on milk containers or any other medium for the promotion of dairy products including fluid milk. N.J.A.C. 2:48-4.3, titled "Unlimited use of coupons in restaurant promotions permitted", allows for any promotional organization or milk processing dealer to enter into promotional arrangements with restaurant owners where coupons are used for promoting the sale of fluid milk or fluid milk products for

consumption on premises. Why is there a difference, within the same subchapter of the regulation, between business entities?

NJFC asks that N.J.A.C. 2:48-1 be rescinded to allow retailers to be authorized to issue discount milk coupons to encourage dairy sales and consumer incentives.

#### **4. Change definition of “construction” for prevailing wage purposes**

First adopted in 1913, New Jersey’s Prevailing Wage Act (Act) was intended to establish a prevailing wage level for workmen engaged in public works in order to safeguard their efficiency and general well being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to efficiency and well-being. New Jersey’s prevailing wage law as well as prevailing wage laws in other States at the time were enacted as part of a general reform of working conditions at the end of the 19<sup>th</sup> and beginning of the 20<sup>th</sup> centuries.

Unfortunately, these laws have morphed into something less than business-friendly and serve to increase costs to business by almost twofold.

NJFC members believe that one aspect related to the prevailing wage laws of New Jersey may be amended to give businesses some form of relief when it accepts a job that is subject to the prevailing wage. The New Jersey Administrative Code (N.J.A.C.) provides the regulations that oversee the implementation of the Act on a daily basis. NJFC members suggest that certain definitions be changed and/or amended which would lower the cost of doing prevailing wage work.

The need for these changes has been made clear through the recent change in the law which requires any project, for example solar panels, using NJ Board of Public Utilities financial assistance is subject to the prevailing wage law. Requiring these types of projects to use the prevailing wage has virtually eliminated any new energy efficient projects from being started. During a time when the State and nation are promoting “green jobs” and the birth of a “green economy”, this requirement is making it economically unfeasible for many companies.

N.J.A.C. 12:60-2.1 defines public work as “construction, reconstruction, demolition, alteration, custom fabrication, or repair work, or maintenance work, including painting and decorating, done under contract and paid for in whole or in part out of the funds of a public body, except work performed under a rehabilitation program. Public work shall also mean construction, reconstruction, demolition, alteration, custom fabrication, or repair work, done

on any property or premises, whether or not the work is paid for from public funds.”

Unfortunately, the Act has never defined the term construction. To some degree, this lack of definition has proved workable in the Act context, since that law applies to all “public works,” which has a broad definition encompassing a variety of activities exceeding the activities that any fair definition of construction could categorically include, such as “repair work, or maintenance work, including painting and decorating.”

The term construction cannot be reasonably read as an all encompassing term, but rather it has a commonly understood meaning as relating to the addition to or modification of real property, such as land, a building or other structures. The legislature chose to use the word construction, rather than the more expansive definition of the type of work covered by the Prevailing Wage Act. As such, the BPU should not presume to expand the scope of the Act beyond that which was reasonably anticipated by the legislature in the use of the common expression “construction.”

Many of the technology improvements for which State financial assistance is granted are placed onto real property but not permanently affixed thereto. Such should not properly be considered construction under the Act. Consistent with the foregoing, we propose the follow definition of construction.

For the purposes of the regulation, “Construction” shall be defined as:

Construction, reconstruction, demolition of or on real property in conjunction with the implementation of any State approved program, for which, financial incentives have been provided by any NJ State Board, Authority or political subdivision thereof.

Installation, reconfiguration, removal, modification, or repair work to personal property (such as machinery) not permanently affixed to real property in conjunction with the implementation of any State approved programs shall not be considered as construction.

## **5. Division of Weights and Measures**

Legislation has been introduced which would amend current New Jersey law concerning the requirement that officers and employees designated to enforce the local weights and measures laws are required to devote all of their time to their duties. The bill would allow other local officials, such as the local construction official, to perform the specialized duties of qualified weights

and measures officers. The intent of this legislation is the consolidation of services at the local level.

The Food Council and the State Office of Weights and Measures have long partnered on weights and measures concerns and how to streamline the process and implement a statewide standard inspection procedure. By allowing municipalities the ability to send out non-weights and measures officials to inspect stores would jeopardize the standard inspection process and create more inspections by municipalities looking to generate revenue through fees and record keeping fines.

NJFC members oppose allowing other, non-qualified, municipal officials the ability to inspect stores for consumer affairs weights and measures issues.

Furthermore, as part of Governor Christie's Transition report, it was suggested that the State Division of Weights and Measures be abolished and those responsibilities given to county and local weights and measures officials. NJFC believes that this is the wrong approach. NJFC supports the elimination of the county and local weights and measures departments with all responsibility to rest at the State level and give the State Superintendent direct authority over the local level. This would allow for uniform enforcement across all twenty-one counties and 566 municipalities in New Jersey and would provide a level of consistency that the business community has been requesting for years.

## **6. Expand Statewide Liquor License Cap**

Current law allows a corporation or entity the ability to own or control no more than two (2) plenary retail liquor licenses on a statewide basis. The current two license cap was created almost half a century ago with the intention to combat price fixing and restrict organized crime from acquiring an excess of liquor licenses. This argument is no longer relevant in today's highly regulated marketplace. NJFC members believe that the current two license cap is antiquated and is an unfair trade restriction as package goods stores circumvent the law to hold additional licenses and prevent competition.

NJFC members support the opening of this closed market to allow for the expansion of the two license cap to allow for competition in the marketplace and will allow supermarkets, which operate on a razor-thin profit margin, to expand its product line and offer consumer the convenience of "one stop" shopping. Currently, New Jersey is one of five states that do not allow supermarkets to sell beer and/or wine in all of its stores.

NJFC's proposal would increase the current cap of two licenses per entity to ten licenses over a ten year period, with a "new" cap of ten licenses per entity on a statewide basis. This proposal will not increase or change any of the

current licensing requirements which are governed by population and local ordinance, but will allow the supermarket industry the ability to compete for any licenses that become available. The proposal will limit the increase of licenses to grocery stores (and liquor stores) to encourage growth of groceries especially in urban areas that are currently underserved and will levy a 10 percent license transfer fee to be paid by the buyer to the municipality. The transfer fee can be used by the municipality to offset property taxes, increase law enforcement or create substance abuse programs within that particular municipality.

Supermarkets have superior enforcement capabilities at the point of sale that would prevent the sale of alcohol beverages to minors. National FBI studies demonstrate that policies and procedures to prevent underage sales to minors are much more successfully enforced by large chain supermarkets than small corner liquor stores. To reinforce this point, a recent Open Public Records Act request made by NJFC has shown no violation over a two year period by grocery stores that currently sell alcohol.

In terms of economic development, increasing the number of licenses a supermarket can hold will provide an incentive for supermarkets to expand in NJ and create many jobs. When a supermarket expands in New Jersey there are a series of economic impacts that occur. Each supermarket employs on average 250 employees. These employees are usually residents of the town in which the supermarket operates. Associates receive health benefits and have retirement plans.

During the construction of a supermarket there are many jobs that are created. Aside from the new employees that will be hired by the supermarket there is construction of a 100,000 square foot facility. This employs all of the building trades. Delivery drivers are also needed in order to supply the supermarket with food. Most of these people are part of the Teamsters Union.

A supermarket usually becomes an anchor of a strip mall. Many other businesses are attracted to an area that a supermarket is located. Supermarkets are also great pillars of the community in which they operate. They contribute to local charitable organizations, scholarships, schools, and recreation leagues.

Finally, it is NJFC's estimate that lifting the 2-limit cap on retail distribution liquor licenses would conservatively raise \$58.4 million for state and local governments. During this period of unprecedented financial upheaval in New Jersey, this revenue is desperately needed.

## **7. Uniform Fire Inspections**

NJFC proposes statewide uniform fire inspection standards to prevent varying inspection processes on a town-by-town basis. This proposal will alleviate the

issue of businesses being subjected to several on-premises inspections which disrupt daily business at a significant cost to the retailer.

As an example, an NJFC member that operates in three different South Jersey towns is subjected to two different inspection procedures by the local fire inspectors. In two of the towns, the procedure is the same; the retailer has its sprinkler company and fire alarm company conduct the inspection and the retailer submits a report to the proper office. However, in the third town, the fire inspector(s) must WITNESS all inspections, which include sprinkler inspections twice a year, fire detectors, sensitivity testing, generator testing (which requires shutting off ALL power to the store), fire alarm system testing and hood testing. This is an extremely time consuming, a threat to food safety and a labor intensive undertaking for the retailer that, when testing the generator, must bring in its generator experts, electricians and refrigerator technicians to shut off all power to the store. The inspector does the inspection and these experts then must turn all the power back on. Also, these inspections are endured during a standard work week and do not occur during the period when the store is normally closed so the store owner must accommodate the inspector and potentially lose business when the store is powered down.

Additionally, allowing town-by-town inspection procedures subjects store owners to potential fines for issues not related to public safety. For example, the retailer referred to above has been subjected to numerous fines for violations not related to the fire safety inspection but because the inspectors were “on site” found other violations throughout the store. In fact, during one inspection there were four (4) inspectors in the store to conduct an inspection. These four inspectors found over three pages of violations for items not related to the fire system or public safety. The retailer did not appeal these violations because the cost of the fines was equal to the cost of an appeal. Retailers are forced to pay fines for supposed “violations” of codes not subject to the initial inspection. Unfortunately, many towns are using this type of inspection process to generate revenue knowing that retailers will pay a nominal fine rather than go through a lengthy appeals process.

NJFC understands that the rules do allow for the inspectors to witness the inspection process; however most towns do not have the time or resources to do it. NJFC believes that as long as the sprinkler and/or fire system company that installed the systems is licensed by the State, it should be able to file the requisite reports with each town and not be subjected to an overly aggressive and extensive inspection process.

NJFC is hopeful that this report will serve as a blueprint for the Red Tape Review Group as to what issues are facing the retail food distribution industry in this economy and in the State of New Jersey. NJFC members would be more than happy to provide any other information that Red Tape Review Group members deem necessary.

