

CHAPTER 25

Food

ARTICLE 2

Adulterated or Misbranded Food

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25-2-1. [Title of act.]

This act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978] may be cited as the New Mexico Food Act.

25-2-2. Definitions.

For the purpose of the New Mexico Food Act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978]:

- A. "board" means the environmental improvement board;
- B. "dairy establishment" means a milk processing or milk producing facility;
- C. "division" means the department of environment;
- D. "director" means the secretary of environment or his authorized representative;
- E. "person" includes individual, partnership, corporation and association;
- F. "food" means:
 - (1) articles used for food or drink for man or animals;

- (2) chewing gum; and
 - (3) articles used for components of food or drink or chewing gum for man or animals;
- G. "label" means a display of written, printed or graphic matter upon the immediate container of any article. A requirement made by or under authority of the New Mexico Food Act that any word, statement or other information appear on the label shall not be considered to be complied with unless such word, statement or other information also appears on the outside container or wrapper, if any, of the retail package of such article or is easily legible through the outside container or wrapper;
- H. "immediate container" does not include package liners;
- I. "labeling" means all labels and other written, printed or graphic matter:
- (1) upon an article or any of its containers or wrappers; or
 - (2) accompanying such article;
- J. if an article is alleged to be misbranded because the labeling is misleading or if an advertisement is alleged to be false because it is misleading, then in determining whether the labeling or advertisement is misleading, there shall be taken into account, among other things, not only representations made or suggested by statement, word, design, device, sound or in any combination thereof, but also the extent to which the labeling or advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling or advertisement relates under the conditions of use prescribed in the labeling or advertisement thereof or under such conditions of use as are customary or usual;
- K. "advertisement" means all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of food;
- L. "contaminated with filth" applies to any food not securely protected from dust, dirt and, so far as may be necessary by all reasonable means, from all foreign or injurious contaminations, or any food found to contain any dust, dirt, foreign or injurious contamination or infestation;
- M. the provisions shall be considered to include the manufacture, production, processing, packing, exposure, offer, possession and holding of any such article and the supplying or applying of any such articles in the conduct of any food establishment; and
- N. "federal act" means the Federal Food, Drug and Cosmetic Act, 21 USC § 301 et seq., the Federal Meat Inspection Act, 21 USC § 601 et seq. and the Federal Poultry Products Inspection Act, 21 USC § 451 et seq.

25-2-3. [Prohibited acts.]

The following acts and the causing thereof within the state of New Mexico are hereby prohibited:

- A. the manufacture, sale or delivery, holding or offering for sale of any food that is adulterated or misbranded.
- B. the adulteration or misbranding of any food.
- C. the receipt in commerce of any food that is adulterated or misbranded and the delivery or proffered delivery thereof for pay or otherwise.
- D. the sale, delivery for sale, holding for sale or offering for sale of any article in violation of Section 12 [25-2-12 NMSA 1978].
- E. the dissemination of any false advertisement.
- F. the refusal to permit entry or inspection, or to permit the taking of a sample, as authorized by Section 16 [25-2-16 NMSA 1978].

- G. the giving of a guaranty or undertaking which guaranty or undertaking is false, except by a person who relied on a guaranty or undertaking to the same effect signed by, and containing the name and address of the person residing in the state of New Mexico from whom he received the food in good faith.
- H. the removal or disposal of a detained or embargoed article in violation of Section 6 [25-2-6 NMSA 1978].
- I. the alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a food, if such act is done while such article is held for sale and results in such article being misbranded.
- J. forging, counterfeiting, simulating or falsely representing, or without proper authority using any mark, stamp, tag, label or other identification device authorized or required by regulations promulgated under the provisions of this act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978].

25-2-4. Power to enjoin violations.

In addition to the remedies hereinafter provided, the division is hereby authorized to apply to the district court for, and such court shall have jurisdiction upon hearing and for such cause shown to grant, a temporary or permanent injunction restraining any person from violating any provision of Section 25-2-3 NMSA 1978, irrespective of whether or not there exists an adequate remedy at law.

25-2-5. Penalties; exceptions.

- A. Any person who violates any of the provisions of Section 25-2-3 NMSA 1978 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than ninety days or a fine of not more than one hundred dollars (\$100) or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final, such person shall be subject to imprisonment for not more than one hundred eighty days or a fine of not more than two hundred dollars (\$200) or both such imprisonment and fine.
- B. No person shall be subject to the penalties of Subsection A of this section for having violated Subsection A or C of Section 25-2-3 NMSA 1978 if he establishes a guaranty or undertaking signed by and containing the name and address of the person residing in the state of New Mexico from whom he received in good faith the article to the effect that such article is not adulterated or misbranded within the meaning of the New Mexico Food Act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978], designating that act.
- C. No publisher, radio-broadcast licensee or agency or medium for the dissemination of an advertisement, except the manufacturer, packer, distributor or seller of the article to which a false advertisement relates, shall be liable under this section by reason of the dissemination by him of such false advertisement unless he has refused, on the request of the director, to furnish to the director the name and post-office address of the manufacturer, packer, distributor, seller or advertising agency residing in the state of New Mexico who causes him to disseminate such advertisement.

25-2-6. Detention of food believed adulterated or misbranded; condemnation; destruction or correction of defect.

A. Whenever the director finds or has probable cause to believe that any food is adulterated or so misbranded as to be dangerous or fraudulent within the meaning of the New Mexico Food Act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978], he shall affix to such article a tag or other appropriate marking, giving notice that such article is, or is suspected of being, adulterated or misbranded and has been detained or embargoed and warning all persons not to remove or dispose of such article by sale or otherwise until permission for removal or disposal is given by the director or the court. It shall be unlawful for any person to remove or dispose of such detained or embargoed article by sale or otherwise without such permission.

B. When an article detained or embargoed under Subsection A of this section has been found by the director to be adulterated or misbranded, he shall petition the judge of the district court in whose jurisdiction the article is detained or embargoed for a libel for condemnation of such article. When the director has found that an article so detained or embargoed is not adulterated or misbranded, he shall remove the tag or other marking.

C. If the court finds that a detained or embargoed article is adulterated or misbranded, such article shall, after entry of the decree, be destroyed at the expense of the claimant thereof under the supervision of the director, and all court costs and fees and storage and other proper expenses shall be taxed against the claimant of such article or his agent; provided that when the adulteration or misbranding can be corrected by proper labeling or processing of the article, the court, after entry of the decree and after such costs, fees and expenses have been paid and a good and sufficient bond, conditioned that such article shall be so labeled or processed, has been executed, may by order direct that such article be delivered to the claimant thereof for such labeling or processing under the supervision of the director. The expense of such supervision shall be paid by the claimant. Such bond shall be returned to the claimant of the article on representation to the court by the director that the article is no longer in violation of the New Mexico Food Act and that the expenses of such supervision have been paid.

D. Whenever the director shall find in any room, building, vehicle of transportation or other structure, any meat, seafood, poultry, vegetable, fruit or other perishable articles which are unsound or contain any filthy, decomposed or putrid substance, or that may be poisonous or deleterious to health or otherwise unsafe, the same being hereby declared to be a nuisance, he shall forthwith condemn or destroy the same or in any other manner render the same unsaleable as human food.

25-2-7. Attorney general or district attorney to institute prosecution; right to hearing before director prior to criminal prosecutions.

It shall be the duty of the attorney general or the various district attorneys of this state to whom the director reports any violation of the New Mexico Food Act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978] to cause appropriate proceedings to be instituted in the proper courts without delay and to be prosecuted in the manner required by law. Before any violation of the New Mexico Food Act is reported to any such attorney for the institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views before the director either orally or in writing, in person or by attorney with regard to such contemplated proceeding.

25-2-8. Minor violations of act; warning authorized.

Nothing in the New Mexico Food Act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978] shall be construed as requiring the director to report, for the institution of proceedings under the New Mexico Food Act, minor violations of that act whenever he believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning.

25-2-9. Promulgation of definitions and standards by the board.

- A. Whenever in the judgment of the board such action will promote honesty and fair dealing in the interest of consumers, the board shall promulgate regulations fixing and establishing for any food or class of food a reasonable definition and standard of identity or reasonable standard of quality or fill of container or any combination of such requirements. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the board shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. The definitions and standards so promulgated shall conform so far as practicable to the definitions and standards promulgated under the authority of the federal act.
- B. In promulgating regulations pursuant to this section, the board shall follow the procedures set forth in Section 74-1-9 NMSA 1978.

25-2-10. When food deemed adulterated.

A food shall be deemed to be adulterated:

- A.
- (1) if it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such good [food] does not ordinarily render it injurious to health; or
 - (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of Section 13 [25-2-13 NMSA 1978]; or
 - (3) if it consists in whole or in part of a diseased, contaminated, filthy, impure or infested ingredient, putrid or decomposed substance, or if it is otherwise unfit for food; or
 - (4) if it has been produced, prepared, packed or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health; or
 - (5) if it is the product of a diseased animal or an animal which has died otherwise than by slaughter, or that has been fed upon the uncooked offal from a slaughterhouse; or
 - (6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.
- B.
- (1) if any valuable constituent has been in whole or in part omitted or abstracted therefrom; or
 - (2) if any substance has been substituted wholly or in part therefor; or
 - (3) if damage or inferiority has been concealed in any manner; or
 - (4) if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is.

- C. if it is confectionery and it bears or contains any alcohol or nonnutritive article or substance except harmless coloring, harmless flavoring, harmless resinous glaze not in excess of four-tenths of one per centum (4/10%), harmless natural gum and pectin; provided, that this paragraph shall not apply to any confectionery by reason of its containing less than two and one quarter per centum by weight of alcohol derived solely from the use of flavoring extracts, or to any chewing gum by reason of its containing harmless nonnutritive masticatory substances.
- D. if it bears or contains a coal-tar color other than one from a batch which has been certified under authority of the federal act.

25-2-11. [When food deemed misbranded.]

A food shall be deemed to be misbranded:

- A. if its labeling is false or misleading in any particular;
- B. if it is offered for sale under the name of another food;
- C. if it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word, imitation and, immediately thereafter, the name of the food imitated;
- D. if its container is so made, formed or filled as to be misleading;
- E. if in package form, unless it bears a label containing:
 - (1) the name and place of business of the manufacturer, packer or distributor;
 - (2) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count; provided, that under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the board;
- F. if any word, statement or other information required by or under authority of this act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978] to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;
- G. if it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by Section 9 [25-2-9 NMSA 1978], unless:
 - (1) it conforms to such definition and standard; and
 - (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring and coloring) present in such food;
- H. if it purports to be or is represented as:
 - (1) a food for which a standard of quality has been prescribed by regulations as provided by Section 9 and its quality falls below such standard unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard; or
 - (2) a food for which a standard or standards of fill of container have been prescribed by regulation as provided by Section 9 [25-2-9 NMSA 1978], and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard;
- I. if it is not subject to the provisions of Paragraph G of this section, unless it bears labeling clearly giving:
 - (1) the common or usual name of the food, if any there be; and
 - (2) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; except that spices, flavorings and colorings, other than

those sold as such, may be designated as spices, flavorings and colorings, without naming each; provided, that, to the extent that compliance with the requirements of clause (2) of this paragraph is impractical or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the board; provided, further, that the requirements of clause (2) of this paragraph shall not apply to any carbonated beverage, the ingredients of which have been fully and correctly disclosed in an affidavit filed with the board;

J. if it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral and other dietary properties as the board determines to be, and by regulations prescribed, as, necessary in order to fully inform purchasers as to its value for such uses;

K. if it bears or contains any artificial flavoring, artificial coloring or chemical preservative, unless it bears labeling stating that fact; provided, that to the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the board.

25-2-12. Manufacturing, packing and processing permits for certain classes of food; suspension; inspections.

A. Whenever the board finds after investigation that the distribution in New Mexico of any class of food may, by reason of contamination with microorganisms during manufacture, processing or packing thereof in any locality, be injurious to health and that such injurious nature cannot be adequately determined after such articles have entered commerce, it then and in such case only shall promulgate regulations providing for the issuance by the director to manufacturers, processors or packers of such class of food in such locality of permits to which shall be attached such conditions governing the manufacture, processing or packing of such class of food for such temporary period of time as may be necessary to protect the public health, and after the effective date of such regulations and during such temporary period, no person shall introduce or deliver for introduction into commerce any such food manufactured, processed or packed by any such manufacturer, processor or packer unless such manufacturer, processor or packer holds a permit issued by the director as provided by such regulations. In promulgating regulations pursuant to this section, the board shall follow the procedures set forth in Section 74-1-9 NMSA 1978.

B. The director is authorized to suspend immediately upon notice any permit issued under authority of this section if it is found that any of the conditions of the permit have been violated. The holder of a permit so suspended shall be privileged at any time to apply for the reinstatement of such permit, and the director shall, immediately after prompt hearing and an inspection of the establishment, reinstate such permit if it is found that adequate measures have been taken to comply with and maintain the conditions of the permit as originally issued or as amended.

C. The director shall have access to any factory or establishment, the operator of which holds a permit from the director for the purpose of ascertaining whether or not the conditions of the permit are being complied with, and denial of access for such inspection shall be ground for suspension of the permit until such access is freely given by the operator.

25-2-13. Promulgating regulations governing the addition of any poisonous or deleterious substances in food.

A. Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice, shall be deemed to be unsafe for purposes of the application of Paragraph (2) of Subsection A of Section 25-2-10 NMSA 1978; but when such substance is so required or cannot be so avoided, the board shall promulgate regulations limiting the quantity therein or thereon to such extent as the board finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purpose of the application of Paragraph (2) of Subsection A of Section 25-2-10 NMSA 1978. While such a regulation is in effect limiting the quantity of any such substance in the case of any food, such food shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated within the meaning of Paragraph (1) of Subsection A of Section 25-2-10 NMSA 1978. In determining the quantity of such added substance to be tolerated in or on different articles of food, the board shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances.

B. In promulgating regulations pursuant to this section, the board shall follow the procedure set forth in Section 74-1-9 NMSA 1978.

25-2-14. [When advertising deemed false.]

An advertisement of a food shall be deemed to be false if it is false or misleading in any particular.

25-2-15. Promulgating regulations; procedure.

A. The authority to promulgate regulations for the efficient enforcement of the New Mexico Food Act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978] is hereby vested in the board. The board is hereby authorized to make the regulations promulgated under the federal act.

B. In promulgating regulations pursuant to this section, the board shall follow the procedures set forth in Section 74-1-9 NMSA 1978.

25-2-16. Power to make inspections and secure samples.

The director shall have free access at all reasonable hours to any factory, warehouse or establishment in which foods are manufactured, processed, packed or held for introduction into commerce or to enter any vehicle being used to transport or hold such foods in commerce for the purpose:

A. of inspecting such factory, warehouse, establishment or vehicle to determine if any of the provisions of the New Mexico Food Act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978] are being violated; and

B. to secure samples or specimens of any food after paying or offering to pay for such sample. It shall be the duty of the director to make or cause to be made examinations of samples secured under the provisions of this section to determine whether or not any provision of the New Mexico Food Act is being violated.

25-2-17. Power of director to publish reports and disseminate information.

A. The director may cause to be published from time to time reports summarizing all judgments, decrees and court orders which have been rendered under the New Mexico Food Act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978], including the nature of the charge and the disposition thereof.

B. The director may also cause to be disseminated such information regarding food as he deems necessary in the interest of public health and the protection of the consumer against fraud. Nothing in this section shall be construed to prohibit the director from collecting, reporting and illustrating the results of his investigations.

25-2-18. Personnel.

The division shall employ such personnel for the administration and enforcement of the provisions of the New Mexico Food Act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978], in the same manner that other public health personnel are now employed, as may be necessary and required.

25-2-19. [New Mexico public health laboratory to serve as testing laboratory.]

The New Mexico public health laboratory shall serve as the testing laboratory for samples collected for examination pursuant to the provisions of this act [25-2-1 to 25-2-19 NMSA 1978].

25-2-20. Dairy establishments exempt.

The purposes and provisions of the New Mexico Food Act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978] shall not apply to dairy establishments.