

**OPINION NO. 950**

**Syllabus:**

A "food service operation within the meaning of Section 3732.01, Revised Code", is being carried on, except as otherwise provided in that Section, where

meals or components thereof are prepared and dispensed or served for a consideration in essentially individual portions, whether or not consumption on the premises involved is intended or permitted.

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To: Robert L. Balyeat, Allen County Pros. Atty., Lima, Ohio  
By: William B. Saxbe, Attorney General, March 27, 1964

You have requested my opinion in answer to the following questions:

"1. Does a super market barbequing chicken and spare ribs, grinding cold meats and blending mayonnaise for a sandwich spread, mixing a cheese salad, and deep-frying doughnuts require an Ohio Food Service Operation license?

"2. Does a fish market deep-frying fish, shrimp and potatoes require an Ohio Food Service Operation license?

"3. Does a pizza carry-out making spaghetti on the premises require an Ohio Food Service Operation license?

"4. Does a party shop (carry out) making potatoe salad, baking beans, mixing coleslaw and making soup require an Ohio Food Service Operation license?

"5. Does a super market barbequing chicken only require an Ohio Food Service Operation license?

"6. Does a super market making, packaging and selling potatoe salad require an Ohio Food Service Operation license?"

You have further asked that, in answering each of these questions, I assume that the food is prepared on the premises and packaged or wrapped for delivery to the customer and that there are no facilities, such as tables and chairs, on the premises where the customers might consume the food delivered.

Omitting exceptions not pertinent to your questions, Section 3732.01, Revised Code, provides:

"\* \* \* \* \*

"(A) A 'food service operation' means:

"(1) Any place which is kept or maintained for the purpose of preparing or serving meals or lunches for a consideration\* \* \*

"\* \* \* \* \*

"(2) Any shop, commissary, or similar

place of operation from which automatic food or beverage machines are serviced, or any location at which food or beverage vending machines have been installed;\* \* \*

\* \* \* \* \* \* \* \*

An annual license fee for each such food service operation is then provided in Section 3732.04, Revised Code.

You have also referred in your letter of request to Rules 300 and 301 of the Ohio Sanitary Code of 1954. The phrase "food service operation" is there defined, however, as "an operation as defined in Section 3732.01 of the Revised Code." In view of this language there could be no significant difference between the scope of the phrase as used in the Revised Code and its scope as used in the Sanitary Code. Further consideration of your questions will, therefore, be on the basis of the Revised Code definition quoted above, with the understanding that the conclusions reached apply as well to the food service regulations in the Ohio Sanitary Code.

In attempting to determine the exact scope of "food service operation" as defined in Section 3732.01, supra, I consider it most significant that reference is made therein not to the preparation or serving of "food", but rather to the preparation or serving of "meals" or "lunches". An examination of the standard dictionary definitions of these latter terms reveals that they are much more closely related to consumption at a single place and time than is the general term "food". "Meal", for instance, may be defined as "the portion of food taken at a particular time to satisfy hunger or appetite." Since the Legislature has chosen to frame its definition in these rather limited terms, I am constrained to conclude that only the preparation or serving of individual portions or assortments or portions, not the preparation or delivery of food in general, was intended.

If the Section 3732.01, supra, contained only the word "serving" and not the word "preparation", it might be proper to further limit the definition in question to cases where food was consumed on the premises. That is not the case, however, and I must therefore conclude that certain kinds of so-called carry-outs are "food service operations," viz. those which prepare and sell food in individually made up portions, despite the fact that no tables, chairs, or counter at which to consume the food is provided.

I am aware that the distinction I have here outlined may present certain problems in application to particular border-line cases. It is, however, essentially the same as has been applied by the Ohio Department of Health for some years, without undue difficulty. I would not, of course, feel bound by the Department of Health practice, if I believed the law required otherwise, but in this case, I am of the opinion that the current practice does correspond with the requirements of law on this subject.

The distinction to be made in determining whether a "food service operation" is being carried on is that between pre-

paring and dispensing in bulk or in mass and preparing and dispensing in individual sized portions. The difference is basically that between preparing and selling whole barbequed chickens or preparing and selling ham salad or potato salad by the pint or quart and preparing and selling box lunches or individual fried chicken servings or ham salad sandwiches. The former is not a "food service operation"; the latter is. The former is not required to pay the annual license fee required in Section 3732.04, supra; the latter is.

Your specific questions do not make perfectly clear whether sales are being made in bulk or in individual portions. From the references to super markets and fish markets in questions 1, 2, 5, and 6, however, I would assume that sales are not made in individual portion units and that a food service license would not, therefore, be required. As to your question number 3, referring to a pizza carry-out selling spaghetti, the answer depends upon whether the spaghetti is being sold by the serving or not. If it is, a food service operation is being carried on even though the servings are not to be consumed on the premises. The same is true in answer to your question number 4. Whether a food service license is required or not depends upon whether the potato salad, baked beans, etc., are being sold in individual servings.

In general answer to your questions it is my opinion and you are advised that a "food service operation within the meaning of Section 3732.01, Revised Code", is being carried on, except as otherwise provided in that Section, where meals or components thereof are prepared and dispensed or served for a consideration in essentially individual portions, whether or not consumption on the premises involved is intended or permitted.