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## **Bake Sales and Spaghetti Dinners: Is Your Nonprofit Legal?**

Nonprofit organizations often try to raise money by selling food items. This fundraising activity, while commonplace, actually requires compliance with different laws. This paper advises a nonprofit how to hold a bake sale, spaghetti dinner, or other similar fundraiser event legally.

### *Who regulates food sales?*

Different state and local authorities regulate the sale of food items. A nonprofit organization may be required to obtain and pay fees for a food establishment (or temporary food establishment) permit for a food sale event or fundraiser depending on the type of food sold and where the event will be held.

Certain cities (e.g. Austin, a home-rule city) exercise their powers as municipalities to regulate health matters within city limits, including the issuance of health-related permits. However, areas that are not regulated by city rules could be subject to permitting requirements from a county or public health district. Texas Health & Safety Code §437 provides that in areas not regulated by a county or public health district (or city code), a permit to operate a food service establishment is nevertheless required from the Texas Department of Health.

To determine whether the event location falls under the authority of a city, a county, a public health district, or whether it is outside of any of these areas, contact a local health authority or the Texas Department of Health (Bureau of Food and Drug Safety, Retail Foods Division, 512-719-0232). After finding out which health authority governs the area in which the event will be held, it is important to contact the authority's local office for further information, rules, and requirements.

### *When does a nonprofit need a permit?*

Each health authority has different permitting rules. In some areas, tax-exempt nonprofits may be exempt from obtaining a permit at all. However, in areas that do require nonprofits to obtain permits, or if a nonprofit does not meet exemption requirements, the rules regarding the circumstances under which a permit is required will vary among different health authorities.

Although the rules may vary, some general factors to look at will be whether:

- the food is prepackaged and not prepared by the nonprofit (e.g. chips);
- the food prepared is potentially hazardous (e.g. foods that need to be temperature-controlled—meats, cheeses, etc.); and
- if the food is sold to the general public as opposed to food served or sold only to members of the nonprofit.

Many jurisdictions will most likely not require a permit for a bake sale where the food served is not potentially hazardous and prepared in a person's own home, but may require a temporary permit for a sale involving tacos, spaghetti, or other potentially hazardous foods that require temperature control and are cooked on site or in a church or event center kitchen.

*Will there be a fee?*

Maybe. While some jurisdictions do not differentiate between nonprofit and any other organizations with regard to permitting fees and requirements, many (including the Texas Department of Health under the Texas Administrative Code, Title 25, Part I, §229.372) provide discounts or exemptions for nonprofits from permit fees.

*Should a nonprofit get a temporary or a year-long permit?*

This depends on whether the food sale is a single or recurring event. Although rules may vary depending on the health authority, most nonprofit fundraising events will probably be considered temporary if the food sale lasts no longer than 14 days and is connected to a single event or celebration. Temporary food establishment permits are less expensive than the standard, year-long permit.

However, a nonprofit may have special circumstances that remove it from the "temporary" category. For example, a church kitchen that operates each week to sell breakfast may have to get a year-long food establishment permit even though different church groups might be the actual "cooks."

*What are the penalties for not having a permit?*

There are strong penalties for operating a food establishment or temporary food establishment without a permit. The penalties will vary depending on the health authority. Penalties may include charges filed against a nonprofit for a Class A or Class C misdemeanor, where each day the violation occurs constitutes a separate offense subject to imprisonment and fines.

*Will a nonprofit food sale be subject to inspection?*

Maybe. Most areas will require a food establishment to pass a pre-permit inspection in order to obtain a standard food establishment permit. However, since temporary food establishments are usually not available for inspection until the day the event begins, there will most likely be no pre-permit inspection requirement in order to obtain a temporary permit. Furthermore, it is unlikely that the temporary food sale will be inspected while in operation, although representatives from the health authority may "make rounds" during a big event.

There is also no inspection requirement for nonprofits that are exempt from obtaining a permit. Rather, any inspection will most likely be the result of a complaint and will determine whether the nonprofit is in compliance with the food health regulations of that particular health authority.

*Does a nonprofit need to comply with health rules?*

Yes. Whether or not a nonprofit is required to obtain a permit, each organization selling food (other than at a bake sale or an event exclusively within the group) will be expected to comply with the Texas Food Establishment Rules (Texas Administrative Code, Title 25, Part 1, Chapter 229, Subchapter K). The purpose of these rules is to help make food safe for human consumption. These rules include standards prescribing proper food preparation and handling, food temperatures, disease control, handwashing, and the type of floors and ceilings required in the food establishment. A nonprofit may be subject to stricter rules depending on the health authority under which the event is held.

*Does a nonprofit need a Food Manager Certificate?*

Maybe. Even in health authorities that do not require a nonprofit to obtain a food establishment permit, an operator or supervisor of the establishment or event may be required to attend training sessions in order to obtain a food manager certificate. These certificates may also be obtained from the local health authority (either a city's local health department, a county, or a public health district). When required, a certified food manager must be on-site throughout the duration of the event.

Factors affecting whether or not a nonprofit must obtain this certificate will vary among health authorities, but are similar to the factors for determining whether a permit is required and usually include whether:

- the food consists of beverages, pre-packaged snacks, or food prepared in a private kitchen that is not potentially hazardous (e.g. bake sale items); and
- the food is made available only to members of the nonprofit as opposed to the general public.

For example, state law authorizes certain populous counties to require trained food managers at each food establishment site, but provides an exemption for an establishment that only handles prepackaged foods. The Austin City Code also exempts a nonprofit from the training certificate requirement if it only serves food to its own members or serves only pre-packaged food.

*Are nonprofits exempt from collecting sales tax?*

No. Even though a nonprofit organization may be considered exempt from paying sales tax on certain purchases, this exemption does not extend to the collection and remittance of sales tax on items sold by the nonprofit. In the case of food sales, a nonprofit may have to obtain a sales tax permit in order to collect taxes on the food it sells. The Texas Tax Code provides some guidance as to when a nonprofit is exempted from this requirement.

*Does a nonprofit have to collect sales tax on a cupcake?*

No. Certain food products are, themselves, not subject to the sales tax requirement. These include cereals, milk, meat products, eggs, fresh fruits, etc., as well as bakery items sold without plates or eating utensils. However, candy, soft drinks, and foods or meals that are prepared or cooked and sold for immediate consumption are not included (e.g. spaghetti, tacos, tamales).

*Does a nonprofit have to collect sales tax at a ballpark concession stand?*

Probably not. An nonprofit does not have to collect sales tax on food products, meals, candy, or soft drinks if the products are sold at an exempt sale. Exempt sales include sales made by members of nonprofit organizations devoted to the exclusive purpose of *education or religious or physical training* where the sale is made to raise funds for the exclusive use of that organization.

The exemption from the collection of sales tax extends to meals and food products sold by churches or at church functions under the church's authority or sold or served by a school (public or private), school district, student organization, or PTA during the regular school day, or by a PTA during a fundraising sale.

*Does a nonprofit have to collect sales tax on its annual banquet?*

No. Even if the nonprofit organization does not exclusively exist for educational, religious, or physical training purposes, all nonprofits are allowed to hold a tax-free annual banquet or other food sale within certain restrictions. This event may not be professionally catered, may not be held in an establishment such as restaurant or hotel, must not be in competition with another retailer required to collect sales tax, and the food must be prepared, served, and sold by members of the organization.

Other fundraising activities may have other state and federal tax implications beyond the scope of this paper. For further information or to obtain an application for a sales tax permit, contact the Comptroller's Tax Assistance Line at 1-800-252-5555.