



The New Food Economy: Sidewalk Vending & Microenterprise Home Kitchens

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**State Preemption in the New Economy for Food:
Sidewalk Vending
(Senate Bill 946)
and
Microenterprise Home Kitchen Operations
(Assembly Bill 626)**

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INTRODUCTION

In 2018, the Legislature adopted two bills that legalized traditional sectors of the informal food economy in California. Senate Bill 946 (SB 946) decriminalized and limited local regulation of sidewalk vending. Assembly Bill 626 (AB 626) decriminalized and limited local regulation of home kitchen operations. Both bills were intended to promote existing small-scale businesses (“microenterprises”) and to promote entrepreneurship and economic empowerment among low income and marginalized communities. The bills also reflect a legislative reaction to widely reported code enforcement cases against vendors and home cooks that were viewed as draconian.

In the process of defining the parameters and priorities of the microenterprise economy, the State preempted cities’ traditional regulatory authority over sidewalk vendors and home occupations. Yet the Legislature recognized that maintaining some regulations in the public interest was critical to the new economy’s legitimacy. It focused those regulations, however, on public health as manifested in food safety. (While sidewalk vending encompasses more than the sale of food, the state’s regulatory role under SB 946 is limited to requiring health permits of food vendors under the California Retail Food Code. Likewise, the primary purpose of AB 626 was to develop a new health permit for the sale of homemade foods.) And yet, cities were not left without a regulatory role.

This paper examines cities’ redefined authority over microenterprises and the new laws governing sidewalk vending and home kitchen operations in California’s communities. In addition to reviewing state constraints on the local police power, the discussion explores the remaining regulatory options for local governments (more for sidewalk vending), and the potential transformation of a cottage industry (from home restaurants to home food demonstrations) as the law governing home kitchens takes hold in the sharing economy.

SIDEWALK VENDING

Sidewalk vending is a quintessential microenterprise in many regions of California. Beginning January 1, 2019, Senate Bill 946 (“SB 946”) decriminalized and limited local regulation of sidewalk vending, with twin goals of promoting entrepreneurship and regularizing the informal economy and protecting undocumented persons from criminal prosecutions and subsequent deportations as a consequence for municipal code violations.¹ Introduced by then-Senator Ricardo Lara, the legislation expressly preempts any city regulations other than time, place, and manner regulations most of which must be “directly related to objective health, safety, or welfare concerns.” The legislation also prohibits any enforcement other than administrative fines, imposes strict caps on those fines, and requires cities to develop an administrative process for vendors in violation to have their fines reduced to reflect their ability to pay.

The first part of this paper provides an overview of the legislation, its genesis, and the available regulatory options for cities, citing to Calabasas, West Hollywood, and Los Angeles as case studies.

BACKGROUND ON SIDEWALK VENDING AND THE IMPETUS BEHIND SB 946

Under state law, a sidewalk vendor is a person who sells “food or merchandise” from any “non-motorized conveyance” upon “a public sidewalk or other pedestrian path.”² Sidewalk vendors can be stationary or mobile. Sidewalk vending does not, however, include food trucks or other persons selling their wares from motor vehicles or on private property.

Sidewalk vending is common throughout the more urban and suburban areas in California, particularly in suburban Southern California. A 2018 legislative report estimated 50,000 sidewalk vendors just in the City of Los Angeles.³ Sidewalk vending allows small-scale microentrepreneurs to sell food and other merchandise with a lower cost of entry and with a significantly lower overall cost burden than operating a traditional brick and mortar retail store. However, sidewalk vending has also created challenges for cities, as it can interfere with open, easy sidewalk access for pedestrians and disabled persons, create trash and rodent problems, and has created economic competition concerns for traditional restaurants and food stores.

Senator Lara authored SB 946 as a solution to two interrelated problems concerning immigration and the informal economy. First, the criminalization of sidewalk vending made many undocumented immigrants more vulnerable to deportation as an effective consequence for municipal code violations. Sen. Lara and other proponents cited, as an example, the widely reported case of an undocumented immigrant and mother of four who was detained by Immigration and Customs Enforcement officials after she was cited for multiple violations of an eastern Los Angeles County city’s ordinance prohibiting sidewalk vending.⁴ This case and several other similar high-profile cases demonstrated that a traditional code enforcement case, usually resolved

¹ Sen. Bill No. 946 (2017-2018 Reg. Sess.)

² Gov. Code, § 51036, subd. (a).

³ Assembly Local Gov. Com., 3d reading analysis of Sen. Bill No. 946 (2017-2018 Reg. Sess.) as amended Aug. 16, 2018.

⁴ Assem. Local Gov. Com., 3d reading analysis of Sen. Bill No. 946 (2017-2018 Reg. Sess.) as amended Aug. 16, 2018.

administratively with a fine, can be significantly elevated into a deportation matter if the person who has violated a municipal code lacks authorization to be in the United States. Second, the author stated cities that criminalized sidewalk vending drove the activity underground and into the informal economy, leaving the vendors vulnerable to exploitation and depriving them of the benefits of regularizing and expanding their entrepreneurial small businesses.

The Legislature concurred with both primary concerns in adopting the bill, which begins by stating sidewalk vendors provide “important entrepreneurship and economic development opportunities to low-income and immigrant communities,” increased access to “culturally significant foods and merchandise,” and contribute “to a safe and dynamic public space.”⁵

SIDEWALK VENDING REGULATIONS AFTER SB 946

Under Senate Bill 946, after January 1, 2019, a city cannot entirely prohibit or criminalize sidewalk vending. The legislation expressly declares that all sidewalk vending regulation shall be a purely civil matter, with fines set at specified maximum amounts, and with a requirement that violators be able to pay a lower fine if they can demonstrate a lack of ability to pay the maximum fines.⁶ The legislation further required dismissal of all pending sidewalk vending criminal prosecutions and created a process for past convictions to be expunged.⁷ Senate Bill 946 expressly preempts any contrary local ordinance, instead requiring any city regulation of sidewalk vendors be consistent with Government Code sections 51036–51039.⁸

Cities have a range of defensible regulations that can be adopted within the legislation’s limits. They can require a sidewalk vending permit or fold sidewalk vending into an existing business license or encroachment permit. The legislation permits a range of reasonable regulations, including restrictions on hours of operations, certain location and zone restrictions, tax registration, and compliance with disability access standards. Cities can also require county health permits for food vendors.⁹ What they cannot do is regulate on the grounds of public animus or concerns for economic competition. The legislation is intended to promote sidewalk vending as a legitimate economic activity and ensure that cities only adopt reasonable time, place, and manner regulations related to objective health, safety, and welfare concerns.

Expressly Permitted Regulations. In general, a city may not restrict sidewalk vending in the public right-of-way or restrict the overall number of vendors permitted to operate within the city unless the restriction is “directly related to objective health, safety, or welfare concerns.”¹⁰ However, the law expressly allows for the following regulations:

- **Residential Zones.** Cities may prohibit stationary sidewalk vendors in residential zones outright, but not mobile sidewalk vendors. Mobile vendors may be subject to

⁵ SB 946, Section 1.

⁶ Gov. Code, § 51039.

⁷ Gov. Code, § 51039, subd. (g).

⁸ Gov. Code, § 51037, subd. (a).

⁹ Gov. Code, § 51037, subd. (b).

¹⁰ Gov. Code, § 51038, subd. (b)(1).

reasonable regulations for reasons directly related to objective health, safety, or welfare concerns, e.g. reasonable hours restrictions.¹¹

- **Permitted Temporary Events and Farmers Markets.** Cities may prohibit sidewalk vendors located near certified farmers' markets, swap meets, or other specially permitted temporary events, but only for the duration of the event.¹²
- **Public Parks.** A city may prohibit all sidewalk vending in a park (including beaches or open space areas) if the city has an exclusive concessionaire agreement for that site.¹³ Otherwise, cities may adopt reasonable regulations specific to parks and natural areas if the regulations are:
 - Directly related to objective health, safety, or welfare concerns,
 - Intended to protect the public's use and enjoyment of the park or natural area and its scenic, natural, and recreational resources, or
 - Necessary to prevent overconcentration of commercial activity within a park that would unreasonably interfere with its character.¹⁴

Examples of permitted park regulations include requirements that vendors stay on paved pathways and out of natural dirt, sand, or grass areas; limits on the number of vendors permitted within a park; and restrictions on hours of operation.

Prohibited Regulations. Under Senate Bill 946, a city is prohibited from adopting any of the following regulations:

- Prohibiting all sidewalk vending;¹⁵
- Requiring a sidewalk vendor to operate only within specific parts of the public right-of-way or only within specific neighborhoods or areas – except for a restriction directly related to objective health, safety, or welfare concerns;¹⁶
- Restricting the overall number of sidewalk vendors permitted to operate within the City– except for a restriction directly related to objective health, safety, or welfare concerns;¹⁷

¹¹ Gov. Code, § 51038, subd. (b)(4)(B).

¹² Gov. Code, § 51038, subd. (d)(1).

¹³ Gov. Code, § 51038, subd. (b)(2)(A).

¹⁴ Gov. Code, § 51038, subd. (b)(2)(B).

¹⁵ Gov. Code, § 51038.

¹⁶ Gov. Code, § 51038, subd. (b)(1).

¹⁷ Gov. Code, § 51038, subd. (b)(5).

- Requiring a sidewalk vendor to first obtain the consent or approval of any nongovernmental entity or individual before he or she can sell food or merchandise;¹⁸ and
- Imposing any requirement rooted in animus or economic competition concerns.¹⁹

Optional Regulations, if Related to Objective Health, Safety, and Welfare Concerns.

A city may further restrict the time, place, and manner of sidewalk vending by ordinance or resolution, if the regulations are directly related to objective health, safety, and welfare concerns. The statute provides a non-exhaustive list of permitted regulations, which includes any of the following:²⁰

- Restricting the hours of operation, if not unduly restrictive. (In nonresidential areas, hours limitations may not be more restrictive than any limitations on hours of operation imposed on other businesses or uses on the same street.).
- Reasonable sanitation requirements, e.g. that trash receptacles be available.
- Requiring compliance with the Americans with Disabilities Act of 1990 (“ADA”) and other disability access standards including not blocking required ADA access paths, e.g. requiring a minimum 48” passable pedestrian path at all times.
- Requiring a city-issued permit for sidewalk vending, together with a valid business license.
- Requiring a valid California Department of Tax and Fee Administration’s seller’s permit, ensuring sales tax law compliance.
- Requiring additional licenses from other state or local agencies to the extent required by law, e.g. county health permits.
- Requiring compliance with other generally applicable laws, e.g. a city’s fire safety requirements.
- Requiring the submission of information on the vendors’ proposed operations.

For this third category of regulations, cities should consider adopting legislative findings justifying the regulations as within the confines of SB 946, meaning rooted in objective health, safety, and welfare concerns (as opposed to community animus or concerns for economic competition).²¹

¹⁸ Gov. Code, § 51038, subd. (b)(3).

¹⁹ Gov. Code, § 51038, subd. (e).

²⁰ Gov. Code, § 51038, subd. (c).

²¹ Gov. Code, § 51038, subd. (e).

SENATE BILL 946 LIMITS ON ENFORCEMENT TOOLS

After January 1, 2019, sidewalk vending can no longer be punished as a criminal infraction or misdemeanor. Instead, any violation of a city's sidewalk vending ordinance or regulations, other than vending without a permit if required, is punishable only by the following maximum administrative fine amounts:²²

First Violation	Administrative Fine of \$100
Second Violation Within One Year of First	Administrative Fine of \$200
Each Additional Violation Within One Year of First	Administrative Fine of \$500
Fourth and Subsequent Violations	Revocation of Permit

If a city requires a sidewalk vendor to obtain a permit, vending without a permit is punishable by the following higher administrative fines:²³

First Violation	Administrative Fine of \$250
Second Violation Within One Year of First	Administrative Fine of \$500
Each Additional Violation Within One Year of First	Administrative Fine of \$1,000

Enforcement of these ordinances can be challenging, particularly given the low deterrent effect inherent in the above state-mandated maximum fine amounts. Each city's regulatory program must also include a process by which a violator may seek a reduction in the above fine amounts due to a demonstrated inability to pay. If the person meets the statutory criteria for a waiver of court fees, fines amounts may be reduced by up to 20 percent.²⁴ A tool to help enforcement is to require each permitted vendor to display the issued permit on the street-side of each cart or other vending device, thereby allowing code enforcement officers to quickly visually confirm the presence or absence of a sidewalk vending permit.

CALABASAS CASE STUDY

Calabasas is a hilly city in north-western Los Angeles County with a mix of rural and suburban residential areas and low-rise commercial developments along the 101 Freeway corridor. Calabasas adopted its sidewalk vending ordinance early in 2019 and serves as a model for similarly situated cities. The Calabasas ordinance, Chapter 9.07 of the Calabasas Municipal Code, requires sidewalk vendors to secure an annual sidewalk vending permit from the Public Works Department, together with a state seller's permit and a county health permit, as required. Calabasas does not

²² Gov. Code, § 51039, subd. (a)(1)(2).

²³ Gov. Code, § 51039, subd. (a)(3).

²⁴ Gov. Code, § 51039, subd. (f); 68632 [fee waiver standards].

require business licenses. Applicants must also declare whether they intend to operate as a stationary or mobile vendor, and if mobile, the proposed route. All applicants must undergo a criminal background check as well.

The Calabasas ordinance adopted regulations under SB 946 as follows:

(1) Limiting sidewalk vending in non-residential areas to the allowable operating hours of other uses on the same street, and further requiring all vending-related equipment be removed from the public right of way between 10:00 p.m. and 8:00 a.m. in all cases;

(2) prohibiting stationary sidewalk vending in residential areas;

(3) limiting mobile sidewalk vendors within residential areas to the hours of 9:00 a.m. through 5:00 pm.;

(4) prohibiting sidewalk vending within 500 feet of a permitted certified farmers' market, permitted swap meet, and any area subject to a temporary use permit for the duration of the permit;

(5) prohibiting sidewalk vending within any park for which the City has entered into exclusive concessionaire agreements;

(6) prohibiting sidewalk vending by any state-registered sex offender;

(7) requiring display of the sidewalk vending permit on the street-side of the cart or conveyance;

(8) requiring a trash receptacle and that vendors selling food or beverages wear hairnets and gloves;

(9) requiring compliance with the City's noise ordinance;

(10) prohibiting sidewalk vending of any adult-oriented material depicting, describing or relating to sexual activities or any alcohol, marijuana, tobacco, or nicotine products; and

(11) prohibiting vending within 500' of any public or private school during school hours and one hour before and after the beginning of classes.

To prevent unintended rolling or slipping of carts into pedestrians or the roadway, sidewalk vendors are also prohibited from operating a pushcart, pedal-driven cart, wagon, or other non-motorized conveyance on any public-right-of-way with a slope greater than five percent. The City adopted these specific, additional regulations to protect the community from adverse fire and traffic safety impacts, given its local characteristics as a heavily hilled city entirely within a very high fire hazard severity zone. The City also intended these regulations to ensure that vending would be allowed in the appropriate parts of its core commercial district.

WEST HOLLYWOOD CASE STUDY

West Hollywood is a major tourist destination and urban city located between Beverly Hills and Hollywood, with several large pedestrian-oriented commercial centers. In June 2019, the City adopted an ordinance to regulate sidewalk vending by means of a specially designated business license. Chapter 5.122 of the West Hollywood Municipal Code requires sidewalk vendors to secure an annual sidewalk vending business license, together with a state seller's permit and a county health permit, as required. To further secure the safety of pedestrians and vendors on its densely populated urban streets, the City has also adopted the following location requirements pursuant to SB 946:

- (1) Sidewalk vending is prohibited within a block of certified farmers' markets and specially permitted events.
- (2) Only mobile vendors are allowed in residential zones, and then only within the hours of 9:00 a.m. to 8:00 p.m.
- (3) Sidewalk vending is prohibited within a block of any public or private school between the hours of 8:00 a.m. to 5:00 p.m. on school days, to minimize adverse impacts from congestion and to maintain open pedestrian pathways for students, teachers, and parents.
- (4) Sidewalk vending is prohibited between the hours of 10 p.m. and 2:00 a.m. on a defined list of streets that are areas of the City with a high concentration of night-life venues. The restricted hours of operation reflect the times when the listed streets are regularly crowded with pedestrians going to and from the night-life venues and are intended to minimize the risks to public safety from overcrowding.
- (5) Sidewalk vending is prohibited within 25' of any valet loading zone, taxicab stand, or other designated loading zone, to also ensure open pedestrian pathways and adequate room for persons to enter and exit loading vehicles.
- (6) The ordinance imposes a graduated minimum sidewalk clearance requirement, requiring all vendors to maintain the following minimum unobstructed pedestrian access clearances:
 - a. Minimum four feet clear for sidewalks up to thirteen feet wide;
 - b. Minimum six feet clear for sidewalks greater than thirteen feet but less than or equal to seventeen feet wide; and
 - c. Minimum eight feet clear for sidewalks greater than seventeen feet wide.

The ordinance further requires all roaming vendors to operate for no more than one hour per four-hour period on any single block in the City, thereby creating a metric for "roaming."

LOS ANGELES CASE STUDY

Unlike the previous case studies, Los Angeles represents a large, urban city with a myriad of environments – from the heart of downtown Los Angeles south to the Port and San Pedro and

west to Venice and the beach. In 2018, Los Angeles had an estimated 50,000 sidewalk vendors operating in the City. It was also the center of much of the political and community activism that resulted in SB 946's passage. The Los Angeles regulatory approach is thus geared toward accommodating its existing large vendor population.

The Los Angeles ordinance, codified in Section 42.13 of the Los Angeles Municipal Code, was adopted in 2018 as an urgency measure, ahead of the state law's effective date on January 1, 2019. The ordinance restricts vending in the City's major tourist destinations, largely for reasons of overcrowding. For example, the Los Angeles ordinance prohibits all vending, both mobile and stationary sidewalk vending, at all times within 500' of the Hollywood Walk of Fame, Universal Studios, and the El Pueblo historical monument. The ordinance also prohibits vending within 500 feet of Dodger Stadium, the Staples Center, and LA Coliseum, but only on event or game days. Vending at Venice Beach is limited to only First Amendment protected expressive activities. For the areas where vending is prohibited at all times, the City has installed signs explaining the prohibition and including a map of the prohibited areas.

The ordinance also provides for additional rules and regulations to be developed by the City's Bureau of Street Services (for vending in the public right-of-way) and by the City's Board of Recreation and Parks Commissioners (for vending in parks), which are to be adopted by resolution of the City Council. Unlike Calabasas and West Hollywood, Los Angeles is not likely to require permits of all 50,000 of the City's vendors given the prohibitive administrative costs. The details are still being discussed, but the Bureau of Street Services has been considering a hybrid regulatory scheme wherein most areas of the City would be governed by the rules and regulations. Site-specific vending permits would then only be required for areas in which vendors currently compete for spaces with the most economic potential (areas such as Downtown Los Angeles and Hollywood).

SIDEWALK VENDING OUTLOOK

Sidewalk vending is an existing microenterprise in many regions of California. SB 946 allows cities to regulate sidewalk vending, with provisions defining regulations cities can adopt outright, cannot adopt, and may adopt with appropriate findings and justification, tying the optional regulations to objective health, safety, and welfare concerns. The legislation also prohibits any enforcement other than civil fines, imposes strict caps on those fines, and requires cities to develop an administrative process for vendors in violation to have their fines reduced to reflect their ability to pay. Three case studies provide examples of available reasonable regulations for small, mid-size, and large cities. In considering a sidewalk vending ordinance, cities should consider their environment, the prevalence and type of existing sidewalk vending, and the implications of possible expansions in future vending activities.

MICROENTERPRISE HOME KITCHEN OPERATIONS (“MEHKOS”)

Effective January 1, 2019, Assembly Bill 626 (AB 626) established “microenterprise home kitchen operations” (“MEHKOs”) as a retail food facility under the California Retail Food Code (“CalCode”).²⁵ Within months of enactment, a coalition of environmental health directors and the bill author, introduced urgency legislation (AB 377) to clarify the law respecting the relative authority of cities and counties over operations and the requirements for a health permit.²⁶ As AB 377 was expected to pass at the time of writing, this paper discusses the law as amended.

A MEHKO involves the use of a private residence for the preparation and sale of food for pick-up, delivery, or onsite dining—much like a restaurant—or for residential food demonstrations and food preparation events. As a retail food service, MEHKOs require a health permit issued under the CalCode. Notably, CalCode enforcement agencies (typically county health departments) have discretion to authorize the permitting of operations within their jurisdiction.²⁷ Of particular note for municipal law, once a county “opts in” to regulate MEHKOs, every incorporated city within the county is bound by that decision. That is, if a county permits them, a city cannot prohibit them—a permitted MEHKO is a permitted use of residential property exempt from the reach of local zoning ordinances.

STATE REGULATION OF MEHKOS

Going beyond cottage foods

Prior to 2013, the sale of homemade food was illegal in California. State law required all food offered for sale to the public to be prepared in a properly inspected and permitted commercial kitchen. In 2012, the California Homemade Food Act authorized the limited commercial use of private homes for the preparation of cottage foods.²⁸

Cottage food products are limited to “nonpotentially hazardous foods,” or foods that do not require refrigeration or other critical time-temperature controls (e.g., homemade breads, candy, dried fruit).²⁹ Given their low risk of food-borne illness, cottage food operations (“CFOs”) are carved out of the definition of “food facility” and separately authorized under CalCode.³⁰

Unlike CFOs, MEHKOs are defined as a type of food facility subject to CalCode with a long list of exemptions. According to bill author Assemblymember Eduardo Garcia, the goal of AB 626 was to “promote economic development, particularly in our most vulnerable communities

²⁵ Health & Saf. Code, § 113700 et seq.

²⁶ Assem. Bill No. 377 (2019-2020 Reg. Sess.). When this paper was submitted for distribution, AB 377 had passed the Legislature and had been presented for the Governor’s signature.

²⁷ With the exception of four city departments (Berkeley, Long Beach, Pasadena, and Vernon), the local enforcement of CalCode is charged to county environmental health departments, and this paper will occasionally refer to the enforcement agency as the county.

²⁸ AB 1616 (Gatto, Chapter 415, Statutes of 2012).

²⁹ See Health & Saf. Code, §§ 113758, 114365.5.

³⁰ Health & Saf. Code, § 113789, subd. (c)(2).

where the sale of homemade food is already incredibly popular.”³¹ As with sidewalk vending, the aim of the law was to legalize and promote existing small-scale entrepreneurs within marginalized communities—the neighborhood tamale lady.

In the process, however, the law opened home kitchen operations to a wider range of “potentially hazardous food” (e.g., meats and hot plates that present an increased risk of contamination and foodborne illness). While county health departments initially balked at securing the safe preparation of potentially hazardous foods in private homes, where people and pets reside,³² a coalition of environmental health directors supported the law as amended (through AB 377) as an improvement over the original bill’s provisions for best practices in food safety.³³

Notably, the law also grants counties discretion over whether to allow (and regulate) or to prohibit MEHKOs, even within the territory of incorporated cities within the county. CalCode agencies typically are not authorized to determine whether or not a category of food facilities (such as restaurants) may operate within a jurisdiction; yet with MEHKOs, a county may opt not to permit them. A county opting in, however, is committing to develop a permitting process which involves facility inspections and requires training for food handlers (more oversight than that what is required for cottage food operations given the increased risk to the public health).

A restricted, and not so restricted, food facility

1. Facility regulations and training operators

A MEHKO is generally regulated as a “restricted food service facility”—the regulatory category for a bed and breakfast—and is exempt from many of CalCode’s requirements. The exemptions recognize the difference between home kitchens and full commercial operations.³⁴ For example, unlike commercial kitchens, MEHKOs are not required to have three-compartment sinks for washing cookware and separate facilities for handwashing, provided that the kitchen has a sink equipped with hot and cold water. MEHKOs are also exempt from CalCode’s plumbing and waste requirements, and from the requirements pertaining to facility ventilation.

Respecting operations, MEHKOs are further exempt from the restrictions against “unnecessary” persons being present in food preparation areas, and from the restrictions against the presence and handling of domestic animals (provided that pets are kept outside the kitchen during food service and preparation).³⁵

Apart from the facility, permitted MEHKO operators must be trained and certified in food safety. Any other person involved in the preparation, storage, or service of food in a MEHKO is also required to obtain a food handler card (issued upon successful completion of a food handler training course and examination).³⁶

³¹ Senate Com. on Health, Analysis of AB 626, (2017-2018 Reg. Sess.), June 13, 2018, p.8.

³² *Id.* at p.11.

³³ Assem. Com. on Health, Analysis of AB 377 (2019-2020 Reg. Sess.), as amended Mar. 25, 2019, p.7.

³⁴ See generally, Health & Saf. Code, § 114367.1.

³⁵ Health & Saf. Code, § 114367.1, subd. (b)(3), (21).

³⁶ Health & Saf. Code, §§ 114367.1, subd. (d), (e); 113948, subd. (b)(3).

2. Restrictions on scale and scope

While MEHKOs may serve potentially hazardous food items, their operations are subject to the following restrictions, intended to ensure that the home kitchen remains a “microenterprise,” or “a stepping stone toward—and not a replacement of—the use of commercial kitchen spaces”³⁷:

- Food is only sold directly to consumers (i.e., no sales to wholesalers or retailers).
- Food is prepared, cooked, and served on the same day.
- Food is consumed onsite, picked up, or delivered within “a safe time period.”
- Food production does not require a Hazard Analysis and Critical Control Point (HACCP) plan (e.g., no cured or smoked foods) and does not involve the production or sale of raw milk or raw milk products.
- Operators may not serve or sell raw oysters.
- The production, processing, freezing, or packaging of milk or milk products (including cheese, ice cream, yogurt, sour cream, and butter) is prohibited.
- No more than 30 individual meals may be prepared per day (or the equivalent of meal components when sold separately), and no more than 60 individual meals per week.
- Operations are limited to annual sales of \$50,000.
- Operations are limited to one full-time equivalent food employee (excluding family members or household members).³⁸

Despite the foregoing restrictions, MEHKOs are permitted to operate an open-air barbecue or an outdoor wood-burning oven.³⁹

3. Permits required

All food safety requirements are implemented through a health permit, which a MEHKO must obtain prior to opening for business.⁴⁰ While local CalCode enforcement agencies have discretion as to whether MEHKOs will be permitted at all within their jurisdiction, once permitting is authorized, the process is ministerial.⁴¹ Enforcement agencies “shall issue” a permit upon application after an initial inspection, and agencies may not impose food safety requirements different from, or in addition to, those set forth in statute.⁴²

4. Limited inspections

After the initial inspection, subsequent inspections are limited:

- No more than one “routine inspection” may be required within 12 months,

³⁷ Senate Com. on Health, Analysis of AB 626, (2017-2018 Reg. Sess.), June 13, 2018, p.8.

³⁸ See generally, Health & Saf. Code, § 113825, subd. (a).

³⁹ Health & Saf. Code, § 114367.1, subd. (c).

⁴⁰ Health & Saf. Code, § 114367.2.

⁴¹ Health & Saf. Code, §§ 114367; 114367.2, subd. (d).

⁴² Health & Saf. Code, § 114367.2, subd. (d)(1), (2).

- An “investigation inspection” requires just cause that a MEHKO is serving adulterated food or otherwise violating the CalCode, and
- An “emergency inspection” requires just cause that a MEHKO poses a serious hazard or immediate threat to public health.⁴³

While restaurants are typically subject to unannounced inspections during operating hours to ensure that food preparation and storage procedures may be accurately assessed, the law accommodates MEHKOs’ dual function as a commercial operation and a private home.⁴⁴ Specifically, MEHKOs are exempt from unannounced visits “so as to protect their privacy.”⁴⁵ Operators receive advance notice of inspections, to the extent reasonable for emergencies, and routine inspections are to be conducted “at a mutually agreeable date and time.”⁴⁶ (It is worth noting that MEHKOs inspected outside of operating hours increase risks to the public health as any unsafe food handling practices would go unobserved.⁴⁷)

5. Food events

In addition to simple meal service, the MEHKO law, as amended, anticipates operators will offer food demonstrations and food preparation events.⁴⁸ While demonstrations and preparation events are not otherwise defined by statute, online platforms, including Airbnb, supported the enactment of AB 626 (Airbnb, in particular, was interested in adding California home kitchens to its array of offerings in local, bookable “experiences”).⁴⁹ The culinary events listed on “Airbnb Experiences” therefore suggest the form that these demonstrations might take.

These include cooking classes on local, homemade fare with hands-on instruction in the host’s kitchen (e.g., classes on making handmade pasta and Chinese dumplings) as well as classes on more refined fare led by professional chefs.⁵⁰ Pictures posted on Airbnb’s platform suggest that class sizes typically range from five to ten people. It is also worth noting that CalCode itself does not specify occupancy limits for MEHKOs, which are deemed a standard residential use for purposes of local building and fire codes.⁵¹

Internet food service intermediaries

An “internet food service intermediary” is a provider of an online platform for MEHKOs that “derives revenues” from its platform services including, but not limited to, advertising fees or fees for processing sales payments.⁵² (Under this definition Facebook, which is free to users, would

⁴³ Health & Saf. Code, § 114367.3.

⁴⁴ Assem. Com. on Health, Analysis of AB 377 (2019-2020 Reg. Sess.) April 2, 2019 hearing, p. 6.

⁴⁵ *Id.*

⁴⁶ Health & Saf. Code, § 114367.3, subd. (a)(1), (2).

⁴⁷ Assem. Com. on Health, Analysis of AB 377 (2019-2020 Reg. Sess.) April 2, 2019 hearing, p. 6.

⁴⁸ AB 377, Sec. 4, amending Health & Saf. Code, § 114367.1 to add subdivision (f) [limiting the sale of food prepared at a demonstration or event to a consumer who was present at the event].

⁴⁹ Sen. Com. on Health, Analysis of AB 626 (2017-2018 Reg. Sess.) June 20, 2018, p. 12; personal communication with Justin Malan, Executive Director of California Conference of Directors of Environmental Health.

⁵⁰ See e.g., Airbnb Experiences listings <https://www.airbnb.com/s/experiences> [as of Sept. 8, 2019].

⁵¹ See Health & Saf. Code, § 114367.4, subd. (b).

⁵² Health & Saf. Code, § 114367.6, subd. (b).

not be an intermediary for users posting homemade meals, whereas Airbnb, by charging fees for facilitating transactions, would be.)

In general, an intermediary is required to register with the California Department of Public Health and is subject to a number of operating requirements.⁵³ These include a requirement to post specified information on the company's website or mobile application, including CalCode's permitting criteria for MEHKOs, platform user fees, and whether the intermediary carries liability insurance relating to the sale or consumption of food listed on its platform.⁵⁴

Intermediaries also facilitate the regulation of MEHKOs. First, MEHKO operators are required to post their permit numbers on platforms and the name of the issuing agency (e.g., Los Angeles County Department of Public Health). Second, intermediaries must allow consumers to file a food safety or hygiene complaint about listed MEHKOs through their platforms. Upon receiving three or more unrelated food safety complaints (or upon receiving notice of similar complaints from a CalCode agency), intermediaries are required to submit the name and permit number of a MEHKO to local enforcement agencies.⁵⁵ Prior to publishing a MEHKO on a platform, intermediaries are required to obtain the MEHKO's consent to these disclosures.⁵⁶

CITIES' REGULATORY ROLE

Like SB 946 (sidewalk vending), AB 626 (the original MEHKOs bill) was enacted under the banner of decriminalizing a segment of the informal food economy and establishing regulations in the public interest. Indeed, as with sidewalk vending, local stories of criminal enforcement actions against home cooks selling food without a permit preceded the legislation.⁵⁷

Unlike the story with sidewalk vending, however, state law itself was the principal barrier to legal home kitchen operations. The sale of food to the public generally requires a food facility permit under CalCode, and until the enactment of AB 626, the permitted sale of homemade food was limited to cottage food operations. Single mothers and retired grandmothers selling ceviche and lasagna to friends and neighbors were thus shut down by local health agencies for the illegal sale of food.⁵⁸ (CalCode violations generally constitute a misdemeanor.⁵⁹) AB 626 was meant to support these "food microentrepreneurs" by legalizing the sale of homemade meals and regulating it.⁶⁰ Regulations were to legitimize the enterprise as well as protect consumers and the public health by "[p]roviding guidelines, training, and safety resources to home cooks."⁶¹

⁵³ Health & Saf. Code, § 114367.6, subd. (a).

⁵⁴ Health & Saf. Code, § 114367.6, subd. (a)(1)-(4).

⁵⁵ Health & Saf. Code, § 114367.6, subd. (a)(7), (8).

⁵⁶ Health & Saf. Code, § 114367.6, subd. (a)(9).

⁵⁷ See local news item <https://reason.com/2016/11/06/single-mother-facing-prison-for-selling> [as of Sept. 8, 2019].

⁵⁸ See local news item <https://newfoodeconomy.org/california-homemade-food-operations-act-2018/> [as of Sept. 8, 2019].

⁵⁹ AB 626, § 1, subd. (a)(12); Health & Saf. Code, § 114395.

⁶⁰ AB 626, § 1, subd. (a)(8)-(10).

⁶¹ AB 626, § 1, subd. (a)(13).

Accordingly, to the extent the law established regulations, they pertain exclusively to food safety and environmental health. Local land use regulations, which would likely restrict, if not prohibit, restaurants in residential zones, were preempted. In brief, AB 626 designates MEHKOs as a permitted use of residential property, exempt from local zoning laws, if approved by the county.⁶² The statute thus dispenses with the traditional partnership between state and local agencies in the regulation of restaurants to create a singular regulatory scheme for MEHKOs.

The usual regulatory partnership

The State occupies the field of health and sanitation standards for retail food facilities through uniform statewide standards set forth in the CalCode.⁶³ Yet the law expressly reserves the authority to “prohibit[] any type of food facility” to local jurisdictions, which typically determine where and when commercial operations are permitted, consistent with the local police power.⁶⁴ Restaurants have long been regulated according to this model of partnership. Local health departments inspect kitchens and issues health permits, while cities issue zoning clearances and land use permits. The State ensures food safety while cities ensure compatibility of uses in accordance with local conditions.

For example, restaurants offering outdoor dining typically obtain permits issued by local planning or public works departments. This is because the regulatory concerns posed by outdoor dining are land use concerns. Permits thus ensure that operators adhere to noise restrictions (particularly live music), hours restrictions, restrictions on alcohol consumption, and disability access and parking requirements.

Preempted zoning authority and remaining City tools

In contrast with the prevailing model of partnership, AB 626 provides that a MEHKO “shall be a permitted use of residential property” provided that it (1) abstains from outdoor signage or advertising and (2) complies with local noise ordinances.⁶⁵ In turn, a city shall not “prohibit the operation of, require a permit to operate, require a rezone of the property for, or levy any fees on, or impose any other restriction on” a MEHKO “for zoning purposes.”⁶⁶ Indeed, a city’s regulatory authority over MEHKOs is limited to enforcing nuisance ordinances⁶⁷ and requiring a business license for revenue purposes⁶⁸.

Enforcing noise ordinances and generalized nuisance ordinances (which guard against uses “injurious to the enjoyment of property”) typically require fact-intensive, laborious investigations

⁶² Health & Saf. Code, § 114367.4.

⁶³ Health & Saf. Code, § 113705.

⁶⁴ Health & Saf. Code, § 113709; *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 190 [holding that CalCode does not preempt all regulation of food facilities, only health and sanitation standards].

⁶⁵ Health & Saf. Code, § 114367.4, subd. (a)(1).

⁶⁶ *Id.*

⁶⁷ Health & Saf. Code, § 114367.4, subd. (a)(2).

⁶⁸ As originally enacted, AB 626 included Health & Saf. Code, § 114367.2, subd. (j), which said that only one local agency could require any fees, permits, or licenses from MEHKOs (creating “the single permit issue”). AB 377 eliminated paragraph (j) from Section 114367.2, restoring the background rule that a food facility is subject to state and local permitting agencies (at least outside of permitting for zoning purposes).

that can exhaust a city’s resources for code enforcement. Apart from noise and potential smell impacts—standard nuisances—a home kitchen operation is most likely to result in traffic impacts, particularly if patrons require on-street parking. A city may, therefore, consider adopting a preferential street parking ordinance and manage parking in residential zones through permits. Checking for parking permits is easy to enforce, but unless a city has already adopted such a program, it presents a bludgeon of a policy response to managing the impacts of home occupations, including MEHKOs.

Charter City Exemption

Notwithstanding the foregoing, charter cities have a good argument for home rule exemption from the MEHKOs statute and thus restoration of their constitutional zoning power. Matters of zoning are traditionally considered “municipal affairs,”⁶⁹ and indeed the authority to prohibit food facilities is expressly reserved to local governments in CalCode’s general provisions.⁷⁰ Absent a compelling argument that a land use triggers a matter of statewide concern, the local police power is at its height respecting the location of commercial uses in a residential zone.⁷¹

To be sure, AB 626 expressly precludes a city’s authority to regulate MEHKOs “for zoning purposes.”⁷² Yet both AB 626 and AB 377 are silent as to the application of the law to charter cities—there is no indication that permitting MEHKOs as a land use (as opposed to a retail food facility) is a matter of statewide concern. Again, the principal legal barrier to home kitchen operations has been the CalCode itself, which for years did not permit the sale of most homemade foods. Yet even after expanding the scope of such sales to potentially hazardous foods, AB 626 provides that local health agencies may opt not to permit MEHKOs within a jurisdiction.⁷³ State law does not grant home cooks a right to the enterprise.

More to the point, the Legislature knows how to address home rule issues if that is its intent, and it did not do so here. For example, the sidewalk vending statute (SB 946) expressly provides that “This act applies to any city . . . including a charter city. The criminalization of small business entrepreneurs . . . are matters of statewide concern.”⁷⁴ There is no comparable indication in AB 626 or AB 377 that MEHKOs present a matter of statewide concern.

HOME OCCUPATIONS IN THE SHARING ECONOMY

Again, the Legislature’s stated aim in enacting AB 626 was to “authorize the use of home kitchens for small-scale, direct food sales.”⁷⁵ The law was not purporting to create an industry—this was not a job creating bill. Rather, the legislative premise was that “an informal economy of

⁶⁹ *City of Los Angeles v. State of California* (1982) 138 Cal.App.3d 526, 533.

⁷⁰ Health & Saf. Code, § 113709.

⁷¹ *Village of Euclid, Ohio v. Ambler Realty Co.* (1926) 272 U.S. 365, 388.

⁷² Health & Saf. Code, § 114367.4, subd. (a)(1).

⁷³ Health & Saf. Code, § 113709.

⁷⁴ SB 946, § 1, subd. (a)(6).

⁷⁵ AB 626, § 1, subd. (b).

locally produced and prepared hot foods exists,”⁷⁶ and the aim was to bring these “existing informal food economies” into the fold of legitimate, regulated food establishments.⁷⁷

A challenge for policymakers, however, is that the form an industry has taken may not be the form it continues to assume, particularly in the “sharing economy.” We have a telling example in short-term vacation rentals. Short-term vacation rentals have existed for decades, but largely in resort and coastal communities and under formal property management.⁷⁸ Property owners required the services of a licensed broker to place properties in the market for lodging accommodations and to facilitate transactions. Airbnb’s rental platforms have lowered the barriers to market entry by assuming the role of broker and connecting homeowners directly with travelers. Increased market access for potential hosts and guests has transformed the industry, bringing short-term rentals to communities worldwide.⁷⁹ Whereas few cities regulated the home rental space before Airbnb, many cities are now regulating short-term rentals as well as online platforms.

In the case of home kitchen operations, the sharing economy is already rewriting the narrative of the neighborhood tamale lady.⁸⁰ Since 2016, local news outlets have reported on Mariza Reulas, a single mother from Stockton, California, caught in a sting operation and charged with misdemeanor crimes for selling homemade ceviche.⁸¹ Reulas was selling her wares through a Facebook food group. Renée McGhee, a retired grandmother in Berkeley to whom health regulators issued a cease and desist letter for selling home-cooked meals to neighbors, was connecting with her customers through a food-sharing platform called Josephine.⁸²

Interest groups opposed to the expanding role of tech platforms in emerging markets have already expressed concerns about the potential “uberization” of food and the exploitation of home cooks through MEHKOs.⁸³ While the potential labor issues are beyond the scope of this paper, the concern for municipalities, is whether online platforms will change the scale of a market and its local impacts. To be sure, the statutory limits on the scale of operations (e.g., no more than 60 meals per week) make serious competition with full-scale restaurants unlikely. Those same limits on volume, however, may cause MEHKO operators to pursue more food preparation events, as advertised on Airbnb Experiences, to improve their margins. (Operators may be able to charge more per seat in a cooking class on homemade pasta than they might charge per plate of pasta.) Whether this will mean more traffic on residential streets, more noise, or nothing at all will be the true test for our existing regulations.

⁷⁶ AB 626, § 1, subd. (a)(8).

⁷⁷ AB 626, § 1, subd. (a)(8), (13).

⁷⁸ K. Heneghan, A. Visveshwara, “Emerging Issues in the Enforcement of Short-Term Rental Regulations,” League of California Cities, City Attorneys’ Spring Conference, May 2017, p. 1, <<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2017/Spring-Conf-2017/Heneghan-ResidentialRentalRegulationIssues>> [as of Sept. 8, 2019].

⁷⁹ *Id.*

⁸⁰ See local news item <https://medium.com/the-dish/the-2017-california-homemade-food-act-bb4655d64009> [as of Sept. 8, 2019].

⁸¹ See local news item <https://newfoodeconomy.org/california-homemade-food-operations-act-2018/> [as of Sept. 8, 2019].

⁸² *Id.*

⁸³ Sen. Com. on Health, Analysis of AB 626 (2017-2018 Reg. Sess.) June 20, 2018 hearing, p. 10.

THE OUTLOOK ON MEHKOS & CITIES' OPTIONS NOW

In short, while AB 626 may have been aimed at promoting an existing informal food economy, the players in the sharing economy are poised to transform the industry. Just as the rise of internet-based home rentals has changed the face of the market for short-term lodgings, MEHKOs, and the rise of internet-based MEHKO operators, may also prove transformative over time. Indeed, the statute itself anticipates as much by regulating both MEHKOs and online platforms.

The State role is what differentiates short-term vacation rentals from MEHKOs. Under AB 626, the CalCode preempts cities' (at least general law cities') primary regulatory authority over MEHKOs (zoning), and may preempt the regulatory field for internet food service intermediaries. (While the statute is not as clear on the issue of field preemption as, say, state law governing the Public Utilities Commission's authority over Ubers and Lyfts, by furnishing detailed regulations of online platforms serving MEHKOs, it creates a state presence where none exists in the short-term rental space.) On the other hand, MEHKOs may not have the same community impacts as short-term rentals. Most MEHKOs may not bother neighbors, and cities' existing nuisance ordinances may capture the occasional bad actor—at this time, we can only speculate.

Whatever the potential impacts on a residential community, cities will not be able to address them through zoning, and enforcing against nuisance violations is, except in clear cases, impractical. Therefore, cities that are particularly concerned by the prospect of home restaurants are best advised to determine their county's position on the issue, and lobby the board of supervisors as necessary. Most county health departments have yet to adopt a MEHKO permitting program, and local government may be more receptive to arguments for local control than was the State. (At the time of writing, the County of Riverside alone had passed a MEHKO ordinance.)

RESOURCES

Sidewalk Vending:

- **Senate Bill 946**
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB946
- **Calabasas Sidewalk Vending Ordinance**
https://library.municode.com/ca/city_of_calabasas/codes/code_of_ordinances?nodeId=TIT9PUPEWE_CH9.07SIVE
- **West Hollywood Sidewalk Vending Ordinance**
http://qcode.us/codes/westhollywood/view.php?topic=5-2-5_122
- **Los Angeles Sidewalk Vending Ordinance**
<https://streetsla.lacity.org/sites/default/files/Vending%20Ordinance.pdf>

Microenterprise Home Kitchen Operations:

- **Assembly Bill 626**
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB626
- **Assembly Bill 377**
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB377