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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 1

[Docket No. 03-030F]

Indemnification of Department of Agriculture Employees

AGENCY: Office of the Secretary, USDA.

ACTION: Statement of policy; final rule.

SUMMARY: The Department of Agriculture is adding a new subpart to part 1 of title 7 of the Code of Federal Regulations. This statement of policy is similar to the policy adopted by other Federal agencies, including the Department of Treasury, Department of the Interior, Department of Health and Human Services, and the Department of Justice in that it permits indemnification of Departmental employees in appropriate circumstances, as determined by the Secretary or the Secretary's designee, for claims made against them as a result of actions taken by them in the course of their employment.

DATES: Effective May 18, 2004.

FOR FURTHER INFORMATION CONTACT:

Philip S. Derfler, Assistant Administrator, Office of Policy and Program Development, Food Safety and Inspection Service, U.S. Department of Agriculture, Room 350-E, Jamie L. Whitten Building, 1400 Independence Avenue, SW., Washington, DC 20250-3700, telephone (202) 720-2709, fax (202) 720-2025.

SUPPLEMENTARY INFORMATION:

The United States Department of Agriculture (USDA) does not now have a policy to indemnify its employees who are sued in their individual capacity and who suffer an adverse judgment as a result of conduct taken within the scope of their official duties. Lawsuits against Federal employees in

their personal capacities have proliferated since the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This decision held that personal damage awards against a Federal employee are permitted when, in the course of his or her employment, the Federal employee is found to have violated an individual's constitutional rights. Although the Federal Liability Reform and Tort Compensation Act of 1988, Public Law 100-694, prohibits personal actions against Federal employees for common law torts committed in the course of employment, that Act does not protect employees from all other types of actions, including those arising under the Constitution. A number of actions have been filed against USDA employees. While the majority of these claims have resulted in judgments adverse to the claimants, the prospect of personal liability and the burden of defending a suit for money damages, simply as a result of doing one's job, has had a negative effect on USDA operations.

The Department believes that actions against Federal employees in their personal capacity may hinder the Department's effectiveness. Uncertainty as to what conduct may lead to a claim tends to intimidate employees and to stifle creativity and decisive action. Employees' fears of personal liability affect government operations, decision making, and policy determinations.

The Department believes that lawsuits against Federal employees in their personal capacity may constitute an impediment to the effective conduct of the public's business. A clear articulation of the Department's policy to permit the indemnification of Department employees should go a long way toward removing this impediment.

The USDA's policy is to permit, but not require, the indemnification of a Department employee who suffers an adverse verdict, judgment, or other monetary award, provided that the actions giving rise to the judgment were taken within the scope of his or her employment, and that such indemnification is in the interest of the United States, as determined by the Secretary or the Secretary's designee. Under the same conditions, the Department may also choose to indemnify an employee who enters into

a final settlement or compromise of an adverse claim.

Generally, the Department will not indemnify or pay to settle or compensate a personal damage claim against an employee before entry of an adverse verdict, judgment, or monetary award. However, in rare cases, the Secretary may determine that exceptional circumstances justify the earlier indemnification or payment of a settlement or compromise amount. This approach is designed to discourage claims against Department employees solely to pressure the Department into settlement. In the usual case, the Department will not compromise a matter before a final determination, even if a dispositive motion filed on behalf of the employee has been denied.

Once a verdict, judgment, or monetary award has been entered against an employee or a settlement proposal entered into by an employee, a Department employee may request indemnification to satisfy that verdict, judgment, award or settlement proposal. The employee shall submit a written request, with appropriate documentation that includes a copy of the verdict, judgment, award or settlement proposal, to the head of his or her employing component. The head of the employee's employing component shall thereupon submit it to the General Counsel, in a timely manner, for a recommended disposition of the request. The Office of the General Counsel shall forward the employee's request, the employing component's recommendation, and the General Counsel's recommendation, along with the time frame in which a decision is needed, to the Secretary or his or her designee for decision. The Secretary or his or her designee will decide promptly whether to indemnify or pay for a settlement of a personal damage claim.

Administration Procedure Act

This policy relates to the Department of Agriculture management and personnel. It is published in final form without the opportunity for public notice and comment because it is a statement of policy. See 5 U.S.C. 553(b)(A).

Executive Order 12866 and the Regulatory Flexibility Act

This policy has been determined to be not economically significant for the purposes of Executive Order 12866. It

will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Paperwork Requirements

This policy is not subject to the Paperwork Reduction Act because it deals solely with internal rules governing Department of Agriculture personnel.

List of Subjects in 7 CFR Part 1

Administrative practice and procedure, Indemnity payments, Government employees, Claims.

■ For the reasons stated in the preamble, title 7 part 1 of the Code of Federal Regulations is amended by adding subpart N to read as follows:

SUBPART N—POLICY WITH REGARD TO INDEMNIFICATION OF DEPARTMENT OF AGRICULTURE EMPLOYEES

Authority: 5 U.S.C. 301.

§ 1.501 Policy on employee indemnification.

(a) Indemnification, under the context of this section, shall be the policy whereby the Department of Agriculture compensates an employee for the legal consequences of conduct, taken within the scope of his or her employment, giving rise to a verdict, judgment, or other monetary award rendered against the employee.

(b) The Department of Agriculture may indemnify a Department employee (which for the purposes of this regulation shall include a former employee) for any verdict, judgment, or other monetary award rendered against such employee, provided the Secretary or the Secretary's designee determines, in his or her discretion, that the conduct giving rise to such verdict, judgment, or award was taken within the scope of his or her employment with the Department, and such indemnification is in the interest of the United States.

(c) The Department of Agriculture may pay for the settlement or compromise of a personal damage claim against a Department employee by the payment of available funds, at any time, provided that the Secretary or the Secretary's designee determines, in his or her discretion, that the alleged conduct giving rise to the personal damage claim was taken within the scope of the employee's employment, and such settlement or compromise is in the interest of the United States.

(d) Absent exceptional circumstances, as determined by the Secretary or his or her designee, the Department will not

entertain a request to agree to indemnify or pay for a settlement of a personal damage claim before entry of an adverse judgment, verdict, or other monetary award.

(e) When a Department employee becomes aware that an action has been filed against the employee in his or her individual capacity as a result of conduct taken within the scope of his or her employment, the employee should immediately notify his or her supervisor that such an action is pending. The supervisor shall promptly thereafter notify the Office of the General Counsel.

(f) A Department employee may request indemnification to satisfy a verdict, judgment, or monetary award entered against the employee or to satisfy the requirements of a settlement proposal. The employee shall submit a written request, with appropriate documentation that includes a copy of the verdict, judgment, award or settlement proposal, as appropriate, to the head of his or her employing component, who shall thereupon submit it to the General Counsel, in a timely manner, a recommended disposition of the request. The Office of the General Counsel shall seek the views of the Department of Justice. The Office of the General Counsel shall forward the employee's request, the employing component's recommendation, and the General Counsel's recommendation, along with the time frame in which a decision is needed, to the Secretary or his or her designee for decision. The Secretary or his or her designee will decide promptly whether to indemnify or pay for a settlement of a personal damage claim.

(g) Any payment under this section to indemnify a Department employee for a personal damage verdict, judgment, or award or to settle a personal damage claim shall be contingent upon the availability of appropriated funds of the employing component of the United States Department of Agriculture.

Ann M. Veneman,

Secretary.

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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 317 and 381

[Docket No.01-018E]

Definitions and Standards of Identity or Composition: Elimination of the Pizza With Meat or Sausage Standards

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule: extension of compliance date.

SUMMARY: The Food Safety and Inspection Service (FSIS) is providing additional time for manufacturers of packaged pizza products to comply with new regulations that require that the labeling of products identified as "pizzas" that contain a meat or poultry component as part of the product name, declare the percent of meat or poultry in the product in a parenthetical statement contiguous to the ingredients statement. The effective date for this final rule was October 22, 2003. The extension of the compliance date for the labeling requirement applies only to those manufacturers of packaged pizzas that have not changed the formulation of their products since the final rule became effective and that continue to use their current label designs without change. FSIS is taking this action to minimize the costs to small manufacturers of packaged pizza products to redesign and print new product labels.

DATES: The compliance date for 9 CFR 317.8(b)(40) and 9 CFR 381.129(f) is extended from October 22, 2003, to July 31, 2004, for manufacturers of packaged pizzas that can and do continue to use their current product labels without change.

FOR FURTHER INFORMATION CONTACT: Robert C. Post, Ph.D., Director, Labeling and Consumer Protection Staff, Office of Policy and Program Development, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250-3700; (202) 205-0279.

SUPPLEMENTARY INFORMATION: On July 31, 2003, FSIS published a final rule in the **Federal Register** to rescind the regulatory standards of identity for "pizza with meat" and "pizza with sausage" by removing 9 CFR 319.600 from the Federal meat inspection regulations (68 FR 44859). The effective date for the final rule was October 22, 2003. As a result of the final rule, products identified as "pizzas" that contain a meat or poultry component as part of the product name are no longer