

IOWA PUBLIC INFORMATION BOARD[497]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 23.6, the Iowa Public Information Board hereby gives Notice of Intended Action to adopt new Chapter 9, “Waivers or Variances from Administrative Rules,” Iowa Administrative Code.

This amendment is proposed pursuant to Iowa Code section 17A.9A that requires an agency to establish a process for waivers or variances from administrative rules. The amendment is based on existing rules adopted by other agencies.

Any interested person may make written suggestions or comments on the proposed amendment on or before July 14, 2015, by contacting Charlie Smithson, Executive Director, Iowa Public Information Board, Wallace State Office Building, Third Floor, 502 East Ninth Street, Des Moines, Iowa 50319. Comments may be submitted by e-mail to Charlie.Smithson@iowa.gov.

The proposed amendment contains specific waiver provisions.

After analysis and review of this rule making, no impact on jobs has been found.

This amendment is intended to implement Iowa Code chapter 17A.

The following amendment is proposed.

Adopt the following **new** 497—Chapter 9:

CHAPTER 9

WAIVERS OR VARIANCES FROM ADMINISTRATIVE RULES

497—9.1(17A) Definition. For purposes of this chapter, a “waiver” or “variance” means action by the board that suspends, in whole or in part, the requirements or provisions of a rule as applied to any identified person on the basis of the particular circumstances of that person. The term “waiver” shall include both a waiver and a variance, and the term “person” shall include any individual or entity subject to the board’s jurisdiction.

497—9.2(17A) Scope of chapter. This chapter outlines generally applicable standards and a uniform process for the granting of individual waivers from rules adopted by the board in situations when no other more specifically applicable law or rule provides for waivers. To the extent another more specific provision of law or rule governs the issuance of a waiver, the more specific provision shall supersede this chapter with respect to any waiver process.

497—9.3(17A) Applicability. The board may grant a waiver from a rule only if the board has sole jurisdiction over the rule and the requested waiver is consistent with applicable statutes, constitutional provisions or other provisions of law. The board may not waive requirements created or duties imposed by statute or court order.

497—9.4(17A) Criteria for waiver. In response to a petition completed pursuant to rule 497—9.6(17A), the board may in its sole discretion issue an order waiving in whole or in part the requirements of a rule if the board finds, based on clear and convincing evidence, all of the following:

1. The application of the rule would impose an undue hardship on the person for whom the waiver is requested;

2. The waiver from the requirements of the rule in the specific case would not prejudice the substantial legal rights of any other person;
3. The provisions of the rule subject to the petition for a waiver are not specifically mandated by statute or court order; and
4. Substantially equal protection of the public interest will be afforded by a means other than that prescribed in the particular rule for which the waiver is requested.

497—9.5(17A) Filing of petition. A petition for a waiver shall be submitted in writing to the Iowa Public Information Board, Wallace State Office Building, Third Floor, 502 East 9th Street, Des Moines, Iowa 50319. If the request relates to a pending contested case, a copy of the request shall also be filed in the contested case proceeding addressed to the board's executive director at the above address.

497—9.6(17A) Content of petition. A petition for waiver shall include the following information where applicable and known to the petitioner:

1. The name, address and telephone number of the person for whom a waiver is being requested and the case number of any related contested cases, if applicable.
2. A description and citation of the specific rule from which waiver is requested.
3. The specific waiver requested, including the precise scope and duration.
4. The relevant facts the petitioner believes would justify a waiver under each of the four criteria described in rule 497—9.4(17A). This shall include a signed statement from the petitioner attesting to the accuracy of the facts provided in the petition and a statement of reasons the petitioner believes will justify a waiver.
5. A history of any contacts between the board and the petitioner within the past three years relating to the activity affected by the proposed waiver. This shall include any notices of violation whether resolved through administration resolution or a contested case proceeding within the past three years.
6. Any information known to the petitioner regarding the board's treatment of similar cases.
7. The name, address and telephone number of any public agency or political subdivision that also regulates the activity in question or that might be affected by the granting of the waiver.
8. The name, address and telephone number of any person or entity that would be adversely affected by the granting of the waiver.
9. The name, address and telephone number of any person with knowledge of facts relevant to the proposed waiver.
10. Signed releases authorizing the persons with knowledge regarding the request to furnish the board with information relevant to the proposed waiver.

497—9.7(17A) Additional information. Prior to issuing an order granting or denying a waiver, the board may request additional information from the petitioner relative to the petition and surrounding circumstances. If the petition was not filed in a contested case, the board may, on its own motion or at the petitioner's request, schedule a telephonic or in-person meeting between the petitioner and the board.

497—9.8(17A) Notice. The board shall acknowledge a petition upon receipt. The board shall ensure that, within 30 days of the receipt of the petition, notice of the pendency of the petition and a concise summary of its contents have been provided to all persons to whom notice is required by any provision of law. In addition, the board may give notice to other persons. To accomplish this notice provision, the board may require the petitioner to serve the notice on all persons to whom notice is required by any provision of law and provide a written statement to the board attesting that notice has been provided.

497—9.9(17A) Hearing procedures. The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case proceedings shall apply to any petition for a waiver filed in a contested case. Those provisions shall otherwise apply to board proceedings for a waiver only when the board so provides by rule or order or is required to do so by statute.

497—9.10(17A) Ruling. An order granting or denying a waiver shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains. The order shall include a statement of the relevant facts and reasons upon which the action is based and a description of the precise scope and duration of the waiver if one is issued.

9.10(1) Board discretion. The final decision on whether the circumstances justify the granting of a waiver shall be made at the sole discretion of the board upon consideration of all relevant factors. The board shall evaluate each petition for a waiver based on the unique, individual circumstances set out in the petition.

9.10(2) Burden of persuasion. The burden of persuasion rests with the petitioner to demonstrate by clear and convincing evidence that the board should exercise its discretion to grant a waiver from a board rule.

9.10(3) Narrowly tailored exception. A waiver, if granted, shall provide the narrowest exception possible to the provisions of the rule.

9.10(4) Administrative deadlines. When the rule from which a waiver is sought establishes administrative deadlines, the board shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all similarly situated persons.

9.10(5) Conditions. The board may place any condition on a waiver that the board finds desirable to protect the public interest.

9.10(6) Time period of waiver. A waiver shall not be permanent unless the petitioner can show that a temporary waiver would be impracticable. If a temporary waiver is granted, there is no automatic right to renewal. At the sole discretion of the board, a waiver may be renewed if the board finds that grounds for the waiver continue to exist.

9.10(7) Time for ruling. The board shall grant or deny a petition for a waiver as soon as practicable but, in any event, shall do so within 120 days of its receipt, unless the petitioner agrees to a later date. However, if a petition is filed in a contested case, the board shall grant or deny the petition no later than the time at which the final decision in that contested case is issued.

9.10(8) When deemed denied. Failure of the board to grant or deny a petition within the required time period shall be deemed a denial of that petition by the board. However, the board shall remain responsible for issuing an order denying a waiver.

9.10(9) Service of order. Within ten business days of its issuance, any order issued under these rules shall be transmitted to the petitioner or the person to whom the order pertains and to any other person entitled to such notice by any provision of law.

497—9.11(17A) Public availability. All orders granting or denying a waiver petition shall be indexed, filed and made available for public inspection as provided in Iowa Code section 17A.3.

497—9.12(17A) Summary reports. The board shall semiannually prepare a summary report identifying the rules for which a waiver has been granted or denied, the number of times a waiver was granted or denied for each rule and a citation to the statutory provisions implemented by the rules. The report shall include a general summary of the reasons justifying the board's actions on waiver requests and, if practicable, shall detail the extent to which the granting of a waiver has affected the general applicability of the rule itself. Copies of this report shall be available for public inspection and shall be provided semiannually to the administrative rules coordinator and the administrative rules review committee.

497—9.13(17A) Cancellation of waiver. A waiver issued by the board pursuant to this chapter may be withdrawn, canceled or modified if, after appropriate notice and hearing, the board issues an order finding any of the following:

1. That the petitioner or the person who was the subject of the waiver order withheld or misrepresented material facts relevant to the propriety or desirability of the waiver; or
2. That the alternative means of ensuring adequate protection of the public interest after issuance of the waiver order have been demonstrated to be insufficient; or

3. That the subject of the waiver order has failed to comply with all conditions contained in the order.

497—9.14(17A) Defense. After the board issues an order granting a waiver, the order is a defense for the person to whom the order pertains, within the terms and the specified facts indicated therein, in any proceeding in which the rule in question is sought to be invoked.

497—9.15(17A) Appeals. Judicial review of a board decision to grant or deny a waiver petition shall be in accordance with Iowa Code chapter 17A.

These rules are intended to implement Iowa Code chapter 17A.