

INSPECTIONS AND APPEALS DEPARTMENT[481]

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 10A.801, the Department of Inspections and Appeals hereby gives Notice of Intended Action to amend Chapter 10, “Contested Case Hearings,” Iowa Administrative Code.

The proposed amendment updates the procedures related to subpoenas in contested case proceedings before the Administrative Hearings Division. Iowa Code section 17A.13 and the existing rule require that these procedures be consistent with the Iowa Rules of Civil Procedure, but confusion has arisen as to how those court rules should be applied in the context of a subpoena in an administrative proceeding. To provide clarity to parties and those who receive a subpoena from the Division, this amendment adds the relevant requirements from Iowa Rule of Civil Procedure 1.1701, modified as necessary to reflect the distinction between court and administrative proceedings. This amendment is not intended to be a substantive change to the legal standards governing subpoenas in contested case proceedings. The amendment also makes several technical corrections arising from changes in technology and the ordinary practices of the Division in issuing subpoenas.

Any interested person may make written suggestions or comments on the proposed amendment on or before January 12, 2016. Such written materials should be addressed to the Director, Department of Inspections and Appeals, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319; faxed to (515)242-6863; or e-mailed to david.werning@dia.iowa.gov.

The Department does not believe that the proposed amendment imposes any financial hardship on any regulated entity, body, or individual.

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

This amendment is intended to implement Iowa Code sections 10A.801 and 17A.13.

The following amendment is proposed.

Amend rule 481—10.14(10A,17A) as follows:

481—10.14(10A,17A) Subpoenas.

10.14(1) Issuance.

a. Pursuant to Iowa Code subsection 17A.13(1), the division shall issue an agency subpoena to a party on request unless otherwise excluded pursuant to this rule. A request for a subpoena shall be in writing. The request may be made in person, or by mail, facsimile (fax), or electronic mail (e-mail), or other electronic means approved by the division. The request shall include the names of the parties, the case number, the name and address of the requested witness, and a description or list of any documents or other items requested. The request shall also note the nature of the proceeding at which the witness is requested to testify (e.g., deposition, telephone hearing, or in-person hearing), the date and time of the proceeding, whether the witness is requested to appear in person or by telephone, the location of the proceeding if it is being conducted in a location other than the Wallace State Office Building, and the method of recording any deposition. A request for a subpoena shall be received by the division at least seven calendar days before the scheduled hearing. The request shall include the name, address, e-mail address, and telephone number of the requesting party.

b. The division shall provide the subpoena to the requesting party by regular mail, fax, ~~or electronic mail~~ e-mail, or other electronic means or allow for pickup during the department’s regular business hours.

~~Parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.~~

~~c. When authorized by law, an administrative law judge (ALJ) may issue a subpoena on the ALJ's own motion.~~

~~d. When there is reasonable ground to believe a subpoena is requested for the purpose of harassment, or that the subpoena requests irrelevant evidence or is untimely, the ALJ division may refuse to issue the subpoena. The ALJ may require the requesting party to provide a statement of testimony expected to be elicited from the subpoenaed witness and a showing of relevancy. If the ALJ division refuses to issue a subpoena, the ALJ division shall provide a written statement of the ground for refusal. A party to whom a refusal is issued may obtain a prompt hearing before an ALJ regarding the refusal by filing with the division and serving on all parties a written request with the division for a hearing, including a statement of testimony, documents, or other items expected to be elicited from the subpoenaed witness and a showing of relevancy to the proceeding.~~

~~e. The issuance of a subpoena by the division does not constitute a ruling by the ALJ that the subpoenaed witness may testify at the hearing or that a subpoenaed document may be admitted into evidence. A party seeking to call a subpoenaed witness to testify or seeking to introduce a subpoenaed document at a hearing must comply with any applicable requirement in statute, administrative rule, or ALJ order regarding the submission of witness or exhibit lists and the disclosure of proposed exhibits to opposing parties.~~

10.14(2) Form and contents.

~~a. Requirements. Any subpoena issued after the commencement of a contested case or other proceeding conducted by the division shall be issued on a form approved by the division and must:~~

~~(1) State that the subpoena is issued by the administrative hearings division of the department of inspections and appeals;~~

~~(2) State the title of the proceeding and its case number;~~

~~(3) Command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody or control; or permit the inspection of premises; and~~

~~(4) Include a guidance document for subpoenaed persons that has been approved by the division and that shall include the text of subrules 10.14(4) and 10.14(5).~~

~~b. Command to attend a deposition; notice of the recording method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.~~

~~c. Combining or separating a command to produce or to permit inspection; specifying the form for electronically stored information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.~~

~~d. Command to produce; included obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.~~

10.14(3) Service of subpoenas.

~~a. The requesting party is responsible for arranging service of a subpoena prior to the hearing or deposition at which the testimony is commanded or the time at which the requested documents must be produced. The party is responsible for any cost associated with serving a subpoena and for the payment of witness fees and mileage expenses. If requested, pursuant to Iowa Code section 622.69, the witness fee is \$10 for a full day's attendance and is \$5 for attendance less than a full day, and mileage shall be paid for each mile actually traveled to participate in an in-person hearing at the rate established by the supreme court for witnesses in court proceedings, except that:~~

~~(1) No peace officer who receives a regular salary, or any other public official shall in any case receive fees as a witness for testifying in regard to any matter coming to the officer's or official's knowledge in the discharge of the officer's or official's official duties in a telephone hearing or an in-person hearing held in the county of the officer's or official's residence, except police officers who~~

are called as witnesses when not on duty. An officer is on duty when paid by the officer's employing agency regardless whether the officer would regularly be on duty at the time of the hearing.

(2) A volunteer fire fighter, as defined in Iowa Code section 85.61, who is subpoenaed to appear as a witness in connection with a matter regarding an event or transaction which the fire fighter perceived or investigated in the course of duty as a volunteer fire fighter shall receive a fee only as provided for under Iowa Code section 622.71A.

b. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance and, if demanded, tendering the fees for one day's attendance and traveling fees to and from the court. If the subpoena commands the production of documents, electronically stored information, or tangible things, then before it is served, a notice must be served on each party. For purposes of this rule, an employee of a state or local governmental agency is not a party merely because the agency is a party and may serve a subpoena unless the employee is also a named party in the proceeding or otherwise ineligible to serve a subpoena.

c. Permissible place of service. A subpoena may be served any place within the state of Iowa.

d. Proof of service. Proving service, when necessary, requires filing with the division a statement showing the date and manner of service and the names of persons served. The server must certify the statement in accordance with Iowa Code section 622.1.

10.14(2) 10.14(4) Motion to quash or modify Protecting a person subject to a subpoena.

a. *Avoiding undue burden or expense; sanctions.* A subpoena may be quashed or modified upon motion for any lawful ground in accordance with the Iowa Rules of Civil Procedure. A party or attorney responsible for serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The administrative law judge must enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney's fees, on a party or attorney who fails to comply.

b. *Command to produce materials or permit inspection.*

(1) Appearance not required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition or hearing.

(2) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises, or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

1. At any time, on notice to the commanded person, the serving party may move for an order compelling production or inspection.

2. These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

c. *Attendance.* Any party shall be permitted to attend at the same time and place and for the same purposes specified in the subpoena. No prior notice of intent to attend is required.

d. *Quashing or modifying a subpoena.*

(1) When required. On timely motion, the administrative law judge must quash or modify a subpoena that:

1. Fails to allow a reasonable time to comply;

2. Requires a person who is neither a party nor a party's officer to travel more than 50 miles from where that person resides, is employed, or regularly transacts business in person, except that a person may be ordered to attend a hearing anywhere within the state in which the person is served with a subpoena;

3. Requires disclosure of privileged or other protected matter, if no exception or waiver applies;

or

4. Subjects a person to undue burden.

(2) When permitted. To protect a person subject to or affected by a subpoena, the administrative law judge may, on motion, quash or modify the subpoena if it requires:

1. Disclosing a trade secret or other confidential research, development, or commercial information;

2. Disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

3. A person who is neither a party nor a party's officer to incur substantial expense to travel more than 50 miles to attend a hearing.

(3) Specifying conditions as an alternative. In the circumstances described in subparagraph 10.14(4) "d"(2), the administrative law judge, instead of quashing or modifying a subpoena, may order appearance or production under specified conditions if the serving party:

1. Shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

2. Ensures that the subpoenaed person will be reasonably compensated.

~~b.~~ (4) A motion to quash or modify a subpoena shall be filed with the division and served on all parties of record pursuant to rule 481—10.12(17A), except that a motion filed by or on behalf of a person who is neither a party nor a party's officer may be filed with the division and served only on the agency with a request for the division to provide a copy of the motion to all non-agency parties. The division may require a person requesting the division to provide the motion to a non-agency party to provide an additional paper copy of the motion and any attached exhibits for the division to provide to the non-agency party.

e. (5) The motion may be set for argument at the discretion of the ALJ administrative law judge. The administrative law judge may limit the participation of a person who is not a party, or the representative of such a person, to the extent necessary to protect any confidential information related to the proceeding.

10.14(5) Duties in responding to a subpoena.

a. Producing documents or electronically stored information. These procedures apply to producing documents or electronically stored information:

(1) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(2) Form for producing electronically stored information not specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(3) Electronically stored information produced in only one form. The person responding need not produce the same electronically stored information in more than one form.

(4) Inaccessible electronically stored information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the administrative law judge may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Iowa Rule of Civil Procedure 1.504(1)(b). The administrative law judge may specify conditions for the discovery.

b. Claiming privilege or protection.

(1) Information withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

1. Expressly make the claim; and

2. Describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(2) Information produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any

party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

This rule is intended to implement Iowa Code sections 10A.104(6) and 17A.13.