

CHAPTER 5
RULES OF PRACTICE FOR OSHA VARIANCES

[Prior to 9/24/86, Labor, Bureau of [530]]
[Prior to 10/7/98, see 374—Ch 5]

875—5.1(17A,88) Purpose and scope. This chapter contains rules of practice for administrative proceedings to grant variances and other relief under Iowa Code sections 17A.9A, 88.5(3), 88.5(6), and 88.5(7).

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.2(17A,88) Definitions. The definitions and interpretations contained in Iowa Code section 88.3 are applicable to the terms when used in this chapter. As used in this chapter unless the context clearly requires otherwise:

“*Affected employee*” means an employee who would be affected by the grant or denial of a variance, or any one of the employee’s authorized representatives, such as the collective bargaining agent.

“*Commissioner*” means the labor commissioner of the department of inspections, appeals, and licensing, division of labor services.

“*Hearing examiner*” means the commissioner or the commissioner’s designee.

“*Party*” means a person admitted to participate in a hearing conducted in accordance with rules 875—5.14(88) through 875—5.21(88). An applicant for relief and any affected employee are entitled to be named parties. For the purpose of special variance hearing procedures under Iowa Code section 88.5(7), the conflicting federal regulatory agency is also a party. The department of inspections, appeals, and licensing, division of labor services, is a party without the necessity of being named.

“*Person*” means an individual, partnership, association, corporation, business trust, legal representative, an organized group of individuals, or an agency, authority or instrumentality of the state of Iowa.

“*Variance*” means waivers or variances pursuant to Iowa Code sections 17A.9A, 88.5(3), 88.5(6), and 88.5(7) unless otherwise specified.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.3 Reserved.

875—5.4(88) Effect of variances. All variances granted pursuant to this chapter have only future effect. The commissioner may discretionarily decline to entertain an application for a variance on a subject or issue concerning which a citation has been issued to the employer involved, and a proceeding on the citation or a related issue concerning a proposed penalty or period of abatement is pending before the employment appeal board until the completion of such proceedings.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.5(17A,88) Submission of waiver information. Information about all orders granting or denying a variance petition are submitted to the legislative services agency through the designated Internet site within 60 days of the granting or denying of the petition. The information submitted is available to the public via the website.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.6 Reserved.

875—5.7(88) Temporary variance.

5.7(1) Application for variance. Any employer or class of employers desiring a variance from a standard, or portion thereof, authorized by Iowa Code section 88.5(3) may file a written application containing the information specified in subrule 5.7(2) with the commissioner.

5.7(2) Contents. An application filed pursuant to subrule 5.7(1) includes:

- a. The name and address of the applicant;
- b. The address of the place or places of employment involved;

- c. Any request for a hearing as provided in this chapter;
- d. The statements and certifications required by Iowa Code section 88.5(3); and
- e. The signature of the applicant or the applicant's authorized representative.

5.7(3) Interim order.

a. *Application.* An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The commissioner may rule ex parte upon the application.

b. *Notice of denial of application.* If an application filed pursuant to paragraph 5.7(3) "a" is denied, the applicant will be given prompt notice of the denial, which will include, or be accompanied by, a brief statement of the grounds therefor.

c. *Notice of the grant of an interim order.* If an interim order is granted, a copy of the order will be served upon the applicant for the order and other parties and notice of the terms of the order will be made in accordance with the notice requirements of rule 875—5.5(88). It shall be a condition of the order that the affected employer shall give notice thereof to affected employees.

This rule is intended to implement Iowa Code section 88.3.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.8(88) Permanent variance.

5.8(1) Application for variance. Any employer or class of employers desiring a variance authorized by Iowa Code section 88.5(6) may file a written application containing the information specified in subrule 5.8(2) with the commissioner.

5.8(2) Contents. An application filed pursuant to subrule 5.8(1) includes:

- a. The name and address of the applicant;
- b. The address of the place or places of employment involved;
- c. A description of the conditions, practices, means, methods, operations or processes used or proposed to be used by the applicant;
- d. A statement showing how the conditions, practices, means, methods, operations or processes used or proposed to be used would provide employment and places of employment to employees that are as safe and healthful as those required by the standard from which a variance is sought;
- e. A certification that the applicant has informed affected employees of the application by (1) giving a copy thereof to their authorized representative; (2) posting a statement giving a summary of the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted (or in lieu of such summary, the posting of the application itself); and (3) other appropriate means when necessary;
- f. Any request for a hearing, as provided in this chapter;
- g. A description of how employees have been informed of the application and of their right to petition the commissioner for a hearing; and
- h. The signature of the applicant or the applicant's authorized representative.

5.8(3) Interim order. Procedures for applications and for notifications of a denial or grant of interim orders are in the same manner as provided for in subrule 5.7(3).

This rule is intended to implement Iowa Code section 88.6.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.9(88) Special variance.

5.9(1) Application for variance. Any employer, or class of employers, desiring a special variance authorized by Iowa Code section 88.5(7) may file a written application containing the information specified in subrule 5.9(2) with the commissioner.

5.9(2) Contents. An application filed pursuant to subrule 5.9(1) includes:

- a. The name and address of the applicant;
- b. The address of the place or places of employment involved;
- c. The name of the federal agency and a designation of the standard, rule, or regulation allegedly in conflict with a standard, rule, or regulation of the division of labor services;

d. A designation of the standard, rule, or regulation of the division of labor services allegedly in conflict;

e. A description of the conditions, means, methods, operations, and procedures used and a specific detailed statement as to how and where the conflict exists between federal agency or agencies and the division of labor services;

f. A description of the conditions, practices, means, methods, operations, or processes used or proposed to be used by the applicant;

g. A statement showing how the conditions, practices, means, methods, operations, or processes used or proposed to be used would take into consideration the safety and health of the employees involved;

h. A certification that the applicant has informed employees affected of the application by (1) giving a copy thereof to their authorized representative; (2) posting a statement giving a summary of the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted (or in lieu of such summary, the posting of the application itself); and (3) other appropriate means where necessary;

i. Any request for a hearing, as provided in this chapter;

j. A description of how employees have been informed of the application and of their right to petition the commissioner for a hearing; and

k. The signature of the applicant or the applicant's authorized representative.

5.9(3) *Interim order.* Procedures for applications and for notifications of a denial or grant of interim orders are in the same manner as provided for in subrule 5.7(3).

This rule is intended to implement Iowa Code section 88.7.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.10(88) Modification and revocation of rules or orders.

5.10(1) An affected employer or an affected employee may apply in writing to the commissioner for a modification or revocation of a rule or order issued under Iowa Code section 88.5(3), 88.5(6), or 88.5(7). The application contains:

a. The name and address of the applicant;

b. A description of the relief that is sought;

c. A statement setting forth with particularity the grounds for relief;

d. If the applicant is an employer, a certification that the applicant has informed affected employees of the application by: (1) giving a copy thereof to their authorized representative; (2) posting at the place or places where notices to employees are normally posted, a statement giving a summary of the application and specifying where a copy of the full application may be examined (or, in lieu of the summary, posting the application itself); and (3) other appropriate means when necessary;

e. If the applicant is an affected employee, a certification that a copy of the application has been furnished to the employer; and

f. Any request for a hearing as provided in this chapter.

5.10(2) The commissioner may move to modify or revoke a rule or order issued under Iowa Code section 88.5(3), 88.5(6), or 88.5(7). In such event, the commissioner will cause a notice of intention to be published in accordance with the notice requirements of rule 875—5.5(88), affording interested persons an opportunity to submit written data, views or arguments regarding the proposal and informing the affected employer and employees of their right to request a hearing, and other action as may be appropriate to notify the affected employer and employees. Any request for a hearing shall include a short and plain statement of:

a. How the proposed modification or revocation would affect the requesting party; and

b. What the requesting party would seek to show on the subjects or issues involved.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.11(88) Action on applications. If an application filed pursuant to subrule 5.7(1), 5.8(1), 5.9(1), or 5.10(1) does not conform to the applicable rule, the commissioner may deny the application. Prompt notice of the denial of an application will be given to the applicant and will include, or be accompanied by, a brief

statement of the grounds for the denial. A denial of an application pursuant to this rule shall be without prejudice to the filing of another application.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.12(88) Requests for hearings on applications.

5.12(1) *Request for hearing.* Within the time allowed by a notice of the filing of an application, any affected employer or employee may file with the commissioner a request for a hearing on the application.

5.12(2) *Contents of a request for a hearing.* A request for a hearing filed pursuant to subrule 5.12(1) includes:

a. A concise statement of facts showing how the employer or employee would be affected by the requested relief;

b. A specification of any statement or representation in the application that is denied and a concise summary of the evidence that would be adduced in support of each denial; and

c. Any views or arguments on any issue of fact or law presented.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.13(88) Consolidation of proceedings. The commissioner may move or any party may move to consolidate or contemporaneously consider two or more proceedings that involve the same or closely related issues.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.14(88) Notice of hearing.

5.14(1) *Contents.* A notice of hearing includes:

a. The time, place, and nature of the hearing;

b. The legal authority under which the hearing is to be held; and

c. A specification of issues of fact and law.

5.14(2) Reserved.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.15(88) Manner of service. Service of any document upon any party may be made by personal delivery of, or by mailing, a copy of the document to the last-known address of the party. The person serving the document certifies the manner and the date of the service.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.16(88) Hearing examiner; powers and duties.

5.16(1) *Powers.* The commissioner or the commissioner's designee presides over the hearing and has all powers necessary or appropriate to conduct a fair, full, and impartial hearing.

5.16(2) *Private consultation.* Except to the extent required for the disposition of ex parte matters, the hearing examiner may not consult a person or a party on any fact at issue unless upon notice and opportunity for all parties to participate.

5.16(3) *Disqualification.* When the commissioner or the commissioner's designee deems appropriate to be disqualified to preside, or to continue to preside, over a particular hearing the commissioner or the commissioner's designee will withdraw therefrom by notice on the record, and the commissioner shall designate another.

Any party who deems the commissioner or commissioner's designee for any reason to be disqualified to preside, or to continue to preside, over a particular hearing, may file with the commissioner a motion for disqualification and removal, supported by affidavits setting forth the alleged ground for disqualification. The commissioner's ruling on the motion is final for the purposes of judicial review under rule 875—5.24(88).

5.16(4) *Contumacious conduct; failure or refusal to appear or obey the rulings of the hearing examiner.* Contumacious conduct at any hearing before the hearing examiner is a ground for exclusion from the hearing.

If a witness or a party refuses to answer a question after being directed to do so, or refuses to obey an order to provide or permit discovery, the hearing examiner may make such orders with regard to the refusal

as are just and appropriate, including an order denying the application of an applicant or regulating the contents of the record of the hearing.

5.16(5) *Referral to Iowa rules of civil procedure.* On any procedural question not regulated by Iowa Code chapter 88 or this chapter, the hearing examiner is guided by the Iowa Rules of Civil Procedure.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.17(88) Prehearing conferences.

5.17(1) *Convening conference.* Upon the commissioner's own motion or the motion of a party, the commissioner or the commissioner's designee may direct the parties or the parties' counsel to meet with the commissioner for a conference to consider:

- a. Simplification of the issues;
- b. Necessity or desirability of amendments to documents for purpose of clarification, simplification, or limitation;
- c. Stipulations, admissions of fact and of contents and authenticity of documents;
- d. Limitation of the number of parties and of expert witnesses; and
- e. Such other matters as may tend to expedite the disposition of the proceeding and to ensure a just conclusion thereof.

5.17(2) *Record of conference.* The commissioner or the commissioner's designee shall make an order that recites the action taken at the conference.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.18(88) Consent findings and rules or orders.

5.18(1) *Negotiation by parties.* A reasonable opportunity may be afforded to permit negotiation by the parties of an agreement containing consent findings and a rule or order disposing of the whole or any part of the proceeding.

5.18(2) *Disposition.* In the event an agreement containing consent findings and rule or order is submitted within the time allowed therefor, the hearing examiner may accept such agreement by issuing a decision based upon the agreed findings.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.19(88) Discovery. Whenever appropriate to a just disposition of any issue in a hearing, the hearing examiner may allow discovery by appropriate procedures, such as by written interrogatories upon a party, depositions, production of documents by a party, or by entry for inspection of the employment or place of employment involved. Iowa Rules of Civil Procedure are applicable to such authorized discovery procedures.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.20(88) Hearings.

5.20(1) *Order of proceeding.* Except as may be ordered otherwise by the hearing examiner, the party applicant for relief proceeds first at a hearing.

5.20(2) *Burden of proof.* The party applicant has the burden of proof.

5.20(3) *Evidence.*

a. *Proof for a special variance.* Before a special variance may be granted, there must be proof that an actual conflict does exist. The proof required to establish such conflict is information in writing or oral testimony from a representative of the involved federal regulatory agency or agencies, substantiated by evidence, that there is a conflict between the standards, rules or regulations of the federal agency and those of the division of labor services. Also, the applicant must prove that compliance with the standard, rule or regulation of the division of labor services would subject the applicant to probable citation, penalty, or prosecution for violating such federal agency standard, rule or regulation.

b. Reserved.

5.20(4) *Transcript.* Hearings are stenographically reported or audio-recorded. Copies of the transcript may be obtained by the parties upon written application filed with the reporter and upon the payment of fees at the rate provided in the agreement with the reporter.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.21(88) Decisions of hearing examiner.

5.21(1) *Proposed findings of fact, conclusions, and rules or orders.* Within ten days after receipt of notice that the transcript of the testimony has been filed or such additional time as the hearing examiner may allow, each party may file with the hearing examiner proposed findings of fact, conclusions of law, and rule or order, together with supporting briefs served on all other parties, and refer to all portions of the record and to all authorities relied upon in support of each proposal.

5.21(2) *Decision.* Within a reasonable time after the time allowed for the filing of proposed findings of fact, conclusions of law, and rule or order, the hearing examiner will issue a decision that will be reviewed and countersigned by the commissioner. The commissioner will serve the decision upon each party, and the decision is final upon the twentieth day after service thereof. The decision will include: (1) a statement of findings and conclusions, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record, and (2) the appropriate rule, order, relief or denial thereof.

5.21(3) *Grant of a special variance.* The grant of a special variance is renewable upon review by the commissioner at six-month intervals beginning on the date the decision becomes final under subrule 5.21(2). If at the time of the review the commissioner finds that there has been a change in the standard, rule, or regulation or a change in the interpretation of such standard, rule or regulation of the federal agency or the division of labor services affecting or resolving the conflict on which the special variance was granted, the commissioner will set the case for an evidentiary hearing in accordance with rules 875—5.14(88) through 875—5.21(88). Enforcement is stayed during review and hearing procedures under this rule.

Affected employees shall be notified by their employer of a renewal or a refusal to renew by: (1) giving a copy of the commissioner's notice to the authorized employee representative; (2) posting a copy of the commissioner's notice at the place or places where notices to employees are normally posted; and (3) other appropriate means.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.22(88) Motion for summary decision.

5.22(1) Any party may, at least 20 days before the date fixed for any hearing, move with or without supporting affidavits for a summary decision in favor of the moving party on all or any part of the proceeding. Any other party may, within ten days after service of the motion, serve opposing affidavits or countermove for summary decision. The hearing examiner may discretionarily set the matter for argument and call for the submission of briefs.

5.22(2) The filing of any documents under subrule 5.22(1) shall be with the commissioner, and copies of any such documents shall be served in accordance with rule 875—5.15(88).

5.22(3) The hearing examiner may grant the motion if the pleadings, affidavits, material obtained by discovery or otherwise obtained, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The hearing examiner may deny such motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

5.22(4) Affidavits shall set forth such facts as would be admissible in evidence in the hearing and show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of its own pleading. The response of the party opposing the motion must set forth specific facts showing that there is a genuine issue of fact for the hearing.

5.22(5) Should it appear from the affidavits of a party opposing the motion that the opposing party cannot for reasons stated present by affidavit facts essential to justify the opposition, the hearing examiner may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.23(88) Summary decision.

5.23(1) *No genuine issue of material fact.*

a. Where no genuine issue of a material fact is found to have been raised, the hearing examiner may issue a decision to become final 20 days after service thereof.

b. A decision made under subrule 5.23(1) includes a statement of: (1) findings and conclusions, and the reasons or bases therefor, on all issues presented; and (2) the terms and conditions of the rule or order made.

5.23(2) *Hearings on issues of fact.* Where a genuine material question of fact is raised, the hearing examiner will, and in any other case may, set the case for an evidentiary hearing in accordance with rules 875—5.14(88) through 875—5.21(88).

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

875—5.24(88) Finality for purposes of judicial review. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

[ARC 8432C, IAB 12/11/24, effective 1/15/25]

These rules are intended to implement Iowa Code sections 17A.9A and 88.5.

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