



Serving the Iowa Legislature

IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

July 8, 2015

2015 Interim No. 1

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Tuesday, July 14, 2015

Administrative Rules Review Committee

9:00 a.m., Room 22, Statehouse

Monday, August 10, 2015

Service Committee of the Legislative Council

3:00 p.m., Room 22, Statehouse

Studies Committee of the Legislative Council

3:15 p.m., Room 22, Statehouse

Legislative Council

3:30 p.m., Room 22, Statehouse

Iowa Legislative Interim Calendar and Briefing is published by the Legal Services Division of the Legislative Services Agency (LSA). For additional information, contact: LSA at (515) 281-3566.

Administrative Rules Review Committee

Chairperson: Representative Dawn Pettengill

Vice Chairperson: Senator Wally Horn

Location: Room 22, Statehouse

Date & Time: Tuesday, July 14, 2015, 9:00 a.m.

Contact Persons: Jack Ewing, LSA Counsel, (515) 281-6048; Tim Reilly, LSA Counsel, (515) 725-7354.

Agenda: Published in the Iowa Administrative Bulletin:

<https://www.legis.iowa.gov/iowaLaw/AdminCode/bulletinSupplementListing.aspx>

Internet Page: <https://www.legis.iowa.gov/committees/committee?endYear=2015&groupID=705>

Service Committee of the Legislative Council

Chairperson: Senator Michael Gronstal

Vice Chairperson: Representative Kraig Paulsen

Location: Room 22, Statehouse

Date & Time: Monday, August 10, 2015, 3:00 p.m.

Legislative Services Agency Contacts: Glen Dickinson, Legislative Services Agency, (515) 281-3566; Richard Johnson, Legal Services, (515) 281-3566.

Agenda: To be announced.

Internet Page: <https://www.legis.iowa.gov/committees/committee?groupID=662>

Studies Committee of the Legislative Council

Chairperson: Senator Michael Gronstal

Vice Chairperson: Representative Kraig Paulsen

Location: Room 22, Statehouse

Date & Time: Monday, August 10, 2015, 3:15 p.m.

Legislative Services Agency Contacts: Richard Nelson, Legal Services, (515) 242-5822; Andrew Ward, Legal Services, (515) 725-2251.

Agenda: To be announced.

Internet Page: <https://www.legis.iowa.gov/committees/committee?groupID=663>

Legislative Council

Chairperson: Representative Kraig Paulsen

Vice Chairperson: Senator Michael Gronstal

Location: Room 22, Statehouse

Date & Time: Monday, August 10, 2015, 3:30 p.m.

Legislative Services Agency Contacts: Glen Dickinson, Legislative Services Agency, (515) 281-3566; Richard Johnson, Legal Services, (515) 281-3566.

Agenda: To be announced.

Internet Page: <https://www.legis.iowa.gov/committees/committee?groupID=703>

ADMINISTRATIVE RULES REVIEW COMMITTEE

June 9, 2015

Chairperson: Representative Dawn Pettengill

Vice Chairperson: Senator Wally Horn

EMERGENCY RULE FILING REVIEWS. Iowa Code section 17A.4(3) provides that an agency can adopt a rule without notice only with specific statutory authority or with prior approval by the Administrative Rules Review Committee. Under this procedure, the committee reviews requests by agencies to adopt rules filed without notice at its monthly meeting or at special meetings if necessary. The committee will approve such filings if the committee finds good cause that notice and public participation would be unnecessary, impracticable, or contrary to the public interest.

The committee considered one filing:

- **Workers' Compensation Division—2015 Payroll Tax Tables, Chapter 7. EMERGENCY FILING APPROVED BY COMMITTEE.**

IOWA PUBLIC INFORMATION BOARD, *Open Records, 05/27/15 IAB, ARC 2010C, NOTICE.*

Background. This rulemaking provides several changes to rules of the Iowa Public Information Board (IPIB) relating to open meetings. The amendments change the rules regarding where and when notice of a meeting must be posted and the reasons for going into a closed session.

Commentary. The Executive Director of IPIB commented that this will be the first of a series of rulemakings regarding open meetings. He noted a desire to clarify several recurring issues, including whether original notice covers all subsequent changes to the time or location of a meeting, and whether the 24-hour notice requirement is continuous or a portion of that time is sufficient. He also indicated that some of these concerns may need to be addressed by the General Assembly in the future.

A representative of the Iowa Hospital Association (IHA) stated that IHA, half of whose members are public hospitals subject to the purview of open meetings laws, would like to see a pause in the rules so that the General Assembly may address the issues. The IHA representative noted, particularly, concern regarding rules governing closed meetings and when meetings must be open to the public. IPIB's Executive Director responded by noting that IPIB seeks input from and will work with any and all interested parties to address concerns as IPIB continues to make changes to its rules.

Action. No action taken.

CORRECTIONS DEPARTMENT, *Iowa Prison Industries, 05/13/15 IAB, ARC 1990C, NOTICE.*

Background. This rulemaking provides for a variety of changes to rules for Iowa Prison Industries (IPI), including matters such as addresses, hours of operation, and location of product catalogs. The amendments also provide that products may be sold to contractors when the products will be sold to a public entity, adopt by reference the provisions of Department of Administrative Services rules dealing with procurement of goods and services, and replace the term "prevailing wage" with "wage range." The amendments define "wage range" as the 10th percentile and 90th percentile wages.

Commentary. Representatives from IPI made a presentation describing the various services IPI offers and how they are carried out and explained the rulemaking. The representatives stated that the change from "prevailing wage" to "wage range" will be nonsubstantive because IPI has always determined wages based on wage range data from Iowa Workforce Development (IWD), not based on a prevailing wage. The representatives stated that neither the amount of wages paid nor the data used to determine those amounts will be affected; this change only codifies current practice. A representative from IWD concurred with that explanation. He stated that prevailing wage data is determined by the U.S. Department of Labor, not IWD; that IWD does not independently generate prevailing wage data for Iowa; that IWD has instead been providing IPI with wage range data; and that this change would conform with IWD's own rules on this subject. In response to questions from committee members, the IWD representative acknowledged that federal prevailing wage data is available online and could be accessed by IWD.

Committee members questioned how IPI ensures that it is not competing with private sector workers for jobs, and the IPI representatives explained a process for ensuring that IPI workers only take jobs for which other workers are not available. It was noted that this process does not account for the differences in employment benefits available to private sector workers and prisoners, respectively. Committee members also questioned IPI's statutory authority to provide for work covered by this rulemaking. IPI representatives described their statutory authority, which they stated was sufficient.

(Administrative Rules Review Committee continued from Page 3)

Public comment was heard from a representative of Iowa businesses in opposition to the proposed provision permitting IPI to sell products to private contractors when the products purchased will be used by a public entity. The representative stated that the provision would cause inappropriate competition with the private sector. The representative questioned IPI's statutory authority for such sales and stated that the jobs impact statement for the rulemaking, which indicated that the rulemaking would have no impact on jobs, is not accurate.

Public comment was also heard from representatives of construction and mechanical contractor unions, who stated their initial concerns that the rulemaking would lead to inappropriate competition with their members were alleviated after further discussions with IPI.

The IPI representatives stated that they will have further discussions with affected stakeholders and that the notice will likely be revised before it is adopted and filed. Committee members stated that this rulemaking will be placed on the July ARRC agenda for further review.

Action. No action taken. Further review at the July meeting.

Next Meeting. The next committee meeting will be held in Statehouse Room 22, on Tuesday, July 14, 2015, beginning at 9:00 a.m.

Secretary ex officio: Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

LSA Staff: Jack Ewing, LSA Counsel, (515) 281-6048; Tim Reilly, LSA Counsel, (515) 725-7354.

Internet Page: <https://www.legis.iowa.gov/committees/committee?endYear=2015&groupID=705>

LEGAL UPDATES

Purpose. Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other interested persons of legislative issues that are the subject of state court and federal district court decisions and regulatory actions, United States Supreme Court decisions, and Attorney General Opinions, including issues involving the constitutionality and interpretation of statutes adopted by the General Assembly. Although a briefing may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.

STATE-ACTION ANTITRUST IMMUNITY FOR PROFESSIONAL LICENSING BOARDS

Filed by the United States Supreme Court

February 25, 2015

North Carolina State Board of Dental Examiners v. Federal Trade Commission

No. 13-534

http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf

Facts and Procedure. After receiving multiple complaints from licensed dentists, the North Carolina State Board of Dental Examiners (Board) began issuing cease-and-desist letters to nondentists who had been providing teeth whitening services and products at prices substantially lower than those charged by dentists. Under North Carolina's Dental Practice Act, the Board's primary duty is to regulate "the practice of dentistry," a term that is not specifically defined to include teeth whitening. At the time of the case, 8 of the 10 dentists on the Board earned substantial fees from teeth whitening services.

The Federal Trade Commission (FTC) filed an administrative complaint against the Board alleging that the Board's actions in preventing nondentists from engaging in the practice of teeth whitening constituted an anticompetitive and unfair method of competition in violation of the Federal Trade Commission Act. The Board moved to dismiss the complaint, claiming that, as an agency of the state, it was immune from liability because it was taking state action. An administrative law judge (ALJ) denied the motion and the ruling was sustained by the FTC. The FTC stated that the Board must be "actively supervised" by the state to claim such immunity, which it was not. After a hearing on the merits of the complaint, an ALJ determined the Board had unreasonably restrained trade in violation of the antitrust law. The ruling was sustained by the FTC and affirmed by the Fourth Circuit Court of Appeals. The United States Supreme Court (Court) granted certiorari.

Issue. Whether state professional licensing boards are entitled to state-action immunity under federal antitrust law?

(Legal Update—State-Action Antitrust Immunity for Professional Licensing Boards continued from Page 4)

Holding. The Court held that a state board can only invoke state-action antitrust immunity if it is subject to “active supervision” by the state. That requirement was not met here because a majority of the Board’s members are “active market participants” in the occupation the Board regulates.

Analysis. The Court has previously provided states immunity from antitrust laws because doing otherwise would likely be an undue burden on each state’s power to regulate. Antitrust immunity generally covers nonstate actors, such as boards controlled by active market participants, if the state clearly articulates the anticompetitive policy and actively supervises the policy. This case focuses on the second prong of that test: whether North Carolina actively supervised the policy adopted by the Board. The Court stated that even though the Board is a state agency, “When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.” Thus, North Carolina’s state supervision of the Board’s action was insufficient because the Board members had an interest in protecting themselves and fellow dentists.

Boards whose members are not “active market participants” may not need to meet the standards set forth in this case. In addition, the Court identified four requirements of action state supervision: the supervisor must review the substance of each anticompetitive policy; the supervisor must have authority to modify or override the policy; the supervisor’s supervision may not be “mere potential;” and the supervisor may not be an active market participant.

Dissent. Three Justices joined in the dissent. The dissent noted that self-regulation for professions such as dentistry predated federal antitrust laws, and that a state’s designation of a board as a state agency should be sufficient for immunity to reach that agency’s actions. The dissent argued that the Court should not attempt to determine whether an agency is sufficiently independent from the market or industry it regulates.

Impact on Iowa. The type of “self-regulation” at issue here is common in Iowa. However, the makeup of various professional licensing boards vary broadly. The Iowa Department of Public Health’s (DPH) Bureau of Professional Licensure regulates 39 professions through 19 professional licensing boards. It is unclear whether DPH oversight would be considered “active supervision” independent of a particular board sufficient to satisfy the Court’s standard in this case. Additionally, rulemaking by licensing boards in Iowa is subject to review by the Administrative Rules Review Committee, a committee of 10 legislators that may object to a rule or vote to delay the implementation of a rule so the full legislature may review the issue.

LSA Monitor. Tim Reilly, Legal Services, (515) 725-7354.