



Serving the Iowa Legislature

IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

September 17, 2015

2015 Interim No. 4

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Tuesday, October 13, 2015

Administrative Rules Review Committee
9:00 a.m., Room 116, Statehouse

Revenue Estimating Conference
1:00 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.

AGENDAS

INFORMATION REGARDING SCHEDULED MEETINGS

Administrative Rules Review Committee

Chairperson: Representative Dawn Pettengill

Vice Chairperson: Senator Wally Horn

Location: Room 116, Statehouse

Date & Time: Tuesday, October 13, 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>

Revenue Estimating Conference

Location: Room 22, Statehouse

Date & Time: Tuesday, October 13, 2015, 1:00 p.m.

Contact Persons: Jeff Robinson, LSA Fiscal Services, (515) 281-4614; Joel Lunde, Department of Management, (515) 281-7072.

Internet Page: <https://www.legis.iowa.gov/committees/committee?endYear=2015&groupID=627>

ADMINISTRATIVE RULES REVIEW COMMITTEE

September 8, 2015

Chairperson: Representative Dawn Pettengill

Vice Chairperson: Senator Wally Horn

EDUCATIONAL EXAMINERS BOARD, *Licensure Fees—\$4 Increase, 09/02/15 IAB, ARC 2131C, NOTICE.*

Background. This rulemaking increases all board licensure fees by \$4. The board anticipates increased expenses that will exceed existing revenue in future fiscal years if its revenues are not increased. 2015 Iowa Acts, HF 658 transferred \$600,000 from the board to the Department of Education, leaving the board with a cash balance of approximately \$550,000 to start fiscal year 2016.

Commentary. Department representatives explained that this fee increase is necessary to ensure the board has sufficient funds in the coming years after the transfer of funds from the board in the 2015 Legislative Session. They noted that this is the board's first fee increase since 2005 and that 25 percent of the fees collected go to the state's general fund, not the board. They stated that the increase is the minimum amount the board believes is possible to avoid deficit spending and that the board would be taking measures to conserve money.

In response to a committee member's question, the representatives explained that the board has largely avoided deficit spending, which requires the board to tap into its reserve funds, in recent years. They stated that the board is willing to tap into its reserve funds if necessary. In response to another question, they explained that without this fee increase, the board would have to cut staff, which would result in diminished services and increased response times from the board.

Committee members questioned whether it was appropriate for the board to increase fees instead of tapping into its reserves and whether a change should be made legislatively to allow the board to retain all the fees it collects.

Action. No action taken.

IOWA FINANCE AUTHORITY, *Title Guarantee Division, 09/02/15 IAB, ARC 2128C, NOTICE.*

Background. This rulemaking strikes and rewrites the authority's rules for its Title Guarantee Division. The division's rules are reorganized, updated, and aligned with statutory authority and current practice. The process for obtaining a title plant waiver is revised.

Commentary. Committee members had several questions regarding changes made to the language in the division's previous rules. Questions included whether the definition of "person," which includes an individual or legal entity such as a corporation, is too broad in the context of describing an abstractor, and whether the definition of "hardship," which must be more than minimal, is appropriate. Authority representatives responded that a broad definition of person is necessary to account for entities other than individuals involved in abstracting and that the definition of hardship complies with a ruling by the Iowa Supreme Court.

Public comment was heard from a representative of the real estate title industry who stated that some stakeholders question the authority's response to the Iowa Supreme Court and would prefer more specificity in the division's rules.

Action. No action taken.

LABOR SERVICES DIVISION, *Elevators—Child Safety Guards, 04/29/15 IAB, ARC 1972C, SPECIAL REVIEW.*

Background. This rulemaking by the Elevator Safety Board requires that safety devices be installed in residential elevators that are installed in public buildings. The board states that about 200 residential elevators operating in public buildings in Iowa will be affected. Elevators built to the residential code are not allowed in buildings under the board's jurisdiction, but were allowed under prior law. This rulemaking was prompted by a study about children being trapped and seriously injured due to hazardous elevator doors. The board has waived the fee for an alteration permit required to comply with this rulemaking.

The rulemaking took effect on June 3, 2015.

Commentary. Committee members stated that 80 percent of churches with elevators have the older, residential elevators that are affected by this rule. Legislators have received complaints from affected churches that have found compliance to be difficult. Committee members also stated that the costs of compliance were proving to be higher than stated previously by the board and that the products necessary for compliance are not readily available. They asked the division's representative how these concerns could be resolved.

The division's representative stated that the board is willing to work with those adversely impacted by the rulemaking to resolve their concerns and wanted to hear feedback from them. She explained that affected persons can seek an extension or a variance, or appeal the board's inspection report. She also noted that the board would be meeting the

(Administrative Rules Review Committee continued from Page 3)

next day and stated that she would raise these concerns with the board.

Action. No action taken.

NATURAL RESOURCE COMMISSION, *Common Snipe, Virginia Rail and Sora, Woodcock, Ruffed Grouse and Dove Hunting—Possession Limits*, 08/05/15 IAB, ARC 2087C, ADOPTED.

Background. This rulemaking revises the possession limits for common snipe, Virginia rail and sora, woodcock, ruffed grouse, and doves for the 2015-2016 hunting season. The new rules comply with the 2015-2016 regulations by the federal Department of Natural Resources.

Commentary. Commission representatives responded to a question discussed when this rulemaking was under notice regarding the commission's authority to authorize a hunting season for Eurasian collared-doves in addition to mourning doves. Hunting mourning doves was statutorily authorized in 2011. The representatives had stated in the past that Eurasian collared-doves can be hard for hunters to distinguish from mourning doves.

The representatives explained that the commission's existing statutory authority, including an inclusive reference to the Columbidae bird family, which includes Eurasian collared-doves, allows the commission to authorize the hunting of such doves. Committee members questioned whether it was appropriate for the commission to authorize the hunting of both mourning doves and Eurasian collared-doves subsequent to legislation that only authorized the former. Committee members also questioned the impact of the commission's rules on rock doves and pigeons and the differences between the two.

Public comments were heard in opposition to the hunting of Eurasian collared-doves. The commenters asserted that the commission did not have the authority to authorize the hunting of Eurasian collared-doves and that the commission had not been responsive or forthcoming to the committee. Public comments were also heard from hunters and conservationists who supported the commission's position on hunting Eurasian collared-doves.

Action. No action taken.

INSURANCE DIVISION, *Regulation of Securities Offerings and Those Who Engage in the Securities Business*, 08/05/15 IAB, ARC 2079C, NOTICE.

Background. This rulemaking makes various changes to the division's rules relating to the terms and conditions under which broker-dealers, investment advisors, and securities offerings operate. The changes include requiring that certain documents be filed electronically, changing fees for certain filings, and clarifying certain travel reimbursement guidelines. The changes also include a requirement that every investment advisor doing business in Iowa create and implement written procedures to address business continuity and succession planning related to possible instances of disruptions or cessation of business activities.

Commentary. Discussion centered on the requirements relating to business continuity and succession planning by an investment advisor. Committee members questioned why the requirements were included in this rulemaking when the requirements were not part of 2015 Iowa Acts, HF 632, which the rulemaking implements. A division representative agreed that the requirements were not included in HF 632 and stated that the division never meant to imply that it was included. He explained that the requirements were based on the North American Securities Administrators Association's Investment Adviser Model Rule and Guidance for Business Continuity and Succession Planning under the Uniform Securities Acts of 1956 and 2002.

Committee members questioned why these requirements needed to be implemented by July 1, 2016, as provided in the rulemaking. The representative explained that the implementation date chosen by the division was not based on any particular requirement from elsewhere. Committee members asked what the penalty for noncompliance with these requirements would be. The representative stated that the division would ask the person to comply. Committee members questioned whether these requirements could have a negative impact on customers in some instances, whether implementing these requirements is necessary at this time, and whether it is appropriate to include these requirements in a rulemaking otherwise intended to implement legislation. Public comment was heard from a representative of a national insurance trade organization who stated that the organization would be willing to work on a legislative solution to this issue in the next legislative session.

The division subsequently communicated to the committee that the requirements relating to business continuity and succession planning by investment advisor would be removed from the rulemaking.

Action. No action taken.

(Administrative Rules Review Committee continued from Page 4)

HUMAN SERVICES DEPARTMENT, *Intellectual Disability Waiver Services Cost-savings Initiative*, 08/05/15 IAB, ARC 2097C, NOTICE.

Background. This rulemaking implements a cost-savings initiative for the Medicaid program. The rulemaking would cap the monthly cost of all intellectual disability (ID) waiver services provided to a member (other than home and vehicle modifications) at the maximum monthly cost of services in an intermediate care facility for persons with intellectual disabilities.

The rulemaking will require an amendment to the ID waiver approved application from the Centers for Medicare and Medicaid Services. The department will be scheduling public hearings on the rulemaking.

Commentary. The department's representative explained the rulemaking. The representative stated that the savings achieved by the rulemaking would be about \$2 million annually. She stated that most people affected by the rulemaking would be transferred to the new Managed Care Initiative, which would govern their service costs once it begins in 2016. The representative stated that certain people in the fee-for-service population would not be transferred and would continue to be affected by the rulemaking. The representative further stated that the department has received over 300 comments opposing the rulemaking, and that public hearings on the rulemaking had been requested and would be held in October.

Action. A motion to suspend further action relating to the notice for 70 days passed 10-0 (seven votes required to pass).

Next Meeting. The next committee meeting will be held in Room 116, Statehouse, on Tuesday, October 13, 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.

LEGAL UPDATE—AFFORDABLE CARE ACT—STATE EXCHANGE

Filed by the United States Supreme Court
June 25, 2015

King et al v. Burwell, Secretary of Health and Human Services, et al
No. 14-114, 576 U.S. ____ (2015)

http://www.supremecourt.gov/opinions/14pdf/14-114_qol1.pdf

Facts. The Federal Patient Protection and Affordable Care Act (Act), enacted in 2010, adopted three key health reforms related to the individual health insurance market. First, the Act bars insurers from taking an individual's health into account when deciding whether to sell insurance or how much to charge. Second, the Act generally requires each individual to maintain insurance coverage or make a payment to the Internal Revenue Service (IRS), unless the cost of insurance is not affordable (exceeds 8 percent of that individual's income), in which case the individual is exempted from either requirement. Third, the Act gives tax credits to individuals with household incomes between 100 and 400 percent of the federal poverty line to purchase insurance.

The first reform makes insurance available to everyone at similar cost, even those who are sick or who have preexisting health conditions. The second reform discourages individuals from waiting until they are sick to purchase insurance by requiring them to either maintain insurance at all times or make a payment to the IRS. This ensures that the pool of individuals insured at any given time includes individuals who are healthy as well as sick, keeping premiums down. The third reform makes insurance more affordable for low-income individuals.

In addition, the Act requires the creation of an "exchange" in each state where individuals can shop for insurance. An exchange may be created and operated by a state, but if a state chooses not to establish its own state exchange, the Secretary of the United States Department of Health and Human Services (Secretary) is required to establish and operate a federal exchange in that state. The Act makes tax credits available to taxpayers enrolled in an insurance plan offered through an "exchange established by the state." The IRS has promulgated a rule providing that a taxpayer is eligible for such tax credits if enrolled in an insurance plan offered through either a state or a federal exchange.

Procedural Background. The petitioners are four individuals who reside in Virginia, which has a federal exchange. They do not want to purchase health insurance. They challenge the IRS rule and argue that the Act makes tax credits available only to individuals enrolled in a state exchange. Since Virginia's exchange was not established by the state, the petitioners maintain that they are not eligible to receive tax credits. Without the tax credits, the cost of buying insurance exceeds 8 percent of their incomes, exempting them from the Act's requirements to either buy health insurance or make a payment to the IRS.

When the petitioners challenged the IRS rule in federal district court, the district court dismissed the suit, holding that the Act unambiguously makes tax credits available to individuals enrolled through a federal exchange. The United States Court of Appeals for the Fourth Circuit (Fourth Circuit) affirmed, but on different grounds, holding that the Act was "ambiguous and subject to at least two different interpretations," thus requiring deference to the IRS's interpretation. On the same day that the Fourth Circuit issued its decision, the United States Court of Appeals for the District of Columbia Circuit vacated the IRS rule, holding that the Act "unambiguously restricts" the tax credits to insurance purchased through state exchanges.

Issue. Whether the Act's tax credits are available in states that have a federal exchange, not a state exchange.

Holding. The United States Supreme Court (Court) held that the text of the Act is ambiguous and interpreted the Act to make tax credits available to individuals who purchase health insurance through a federal exchange as well as a state exchange.

Analysis. The Court found that because tax credits are among the Act's key reforms, interpretation of the Act is the

(Legal Update—Affordable Care Act—State Exchange continued from Page 6)

task of the Court absent an express delegation of that authority to the IRS, which there is not. The Court then found that the phrase “an exchange established by the state,” in describing eligibility for the tax credits, is ambiguous when looking at the phrase in the context of the Act as a whole. Since state and federal exchanges are otherwise equivalent under the Act, that is, they must meet the same requirements, perform the same functions, and serve the same purposes, if tax credits are available only on state exchanges, state and federal exchanges would instead differ in a fundamental way.

The Court stated that a fundamental canon of statutory construction is that the words of a statute must be read in context and with a view to the place of the words in the overall statutory scheme. The Court rejected the petitioners’ interpretation of the Act because it would destabilize the individual insurance market in any state with a federal exchange and result in extending the coverage requirement of the Act to “a lot fewer” individuals.

The Court found that in 2014, approximately 87 percent of individuals who bought insurance on a federal exchange did so with tax credits and without those credits, virtually all of those individuals would become exempt from the Act’s coverage requirement. The Court concluded that it is implausible that Congress meant the Act to operate in this manner and that the context and structure of the Act compelled the Court to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.

The Court held that the Act allows tax credits for insurance purchased on any exchange created under the Act. The Court said that it must respect the role of the Legislature and take care not to undo what the Legislature has done. A fair reading of legislation demands a fair understanding of the legislative plan.

Dissent. Three justices dissented. The dissent bluntly opined that the Court’s holding interpreting “exchange established by the state” to mean “exchange established by the state or the federal government,” is absurd. Any effort to understand rather than to rewrite a law must accept and apply the presumption that lawmakers use words in “their natural and ordinary signification.” The Court’s interpretation nullifies Congress’ use of the phrase “by the state” numerous times throughout the Act and does not come close to presenting the compelling contextual case necessary to justify departing from the ordinary meaning of the terms of the law. Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision.

The dissent argued that, like it or not, the express terms of the Act make only two of the three reforms mentioned by the Court applicable in states that do not establish exchanges. The fact that the statutory scheme contains a flaw does not show that the statute means the opposite of what it says. The Court does not have the power to rescue Congress from its drafting errors.

In addition, the Act displays a congressional preference for state participation in the establishment of exchanges. Even if making tax credits available on all exchanges advances the goal of improving healthcare markets, it frustrates the goal of encouraging state involvement in the implementation of the Act. It is plausible that the availability of tax credits was deliberately restricted to state exchanges to encourage states to establish their own exchanges. Rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act’s limitation of tax credits to state exchanges.

Impact on Iowa. In 2013, Iowa received approval from the Secretary to establish a state-federal partnership exchange in order to avoid default into a federal exchange. As a partnership state, Iowa assists mainly with plan management functions of the exchange but did not establish an operating structure because the Secretary established and is operating the exchange.

In June 2015, the Iowa Insurance Division released a statement in response to the Court’s decision indicating that Iowans currently receiving tax credits while using the state-federal partnership exchange in Iowa appear to be able to continue doing so. The latest figures available at that time were from March 2015, and showed that 45,162 Iowans used the state-federal partnership exchange to get coverage and 86 percent of those individuals received a tax credit to help pay for their coverage. See Statement from the Iowa Insurance Division Regarding Supreme Court Decision in *King vs. Burwell*, available at <http://www.iid.state.ia.us/node/10976403> (last visited September 16, 2015)

LSA Monitor: Ann Ver Heul, Legal Services, (515) 281-3837.

LEGAL UPDATE—WARRANTLESS VEHICLE SEARCHES INCIDENT TO ARREST

Filed by the Iowa Supreme Court

June 30, 2015

State of Iowa vs. Jesse Michael Gaskins

No. 13-1915, 866 N.W.2d 1 (Iowa 2015)

http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Supreme_Court_Opinions/Recent_Opinions/20150630/13-1915.pdf

Factual Background. On December 18, 2012, a Davenport police officer performed a traffic stop on a vehicle operated by the defendant, Jesse Gaskins, after observing the vehicle moving on the roadway with expired license plates. Upon approaching the vehicle, the officer smelled marijuana. The defendant initially denied that there was marijuana in the vehicle, but eventually revealed a marijuana blunt to the officer. The officer arrested the defendant and secured him inside the police car. Based on the defendant's previous denial about the marijuana, the officer believed the vehicle might contain more drugs. While searching the vehicle, another officer discovered a portable, locked safe between the driver's seat and rear passenger seats. After finding a key to the safe on the keyring in the vehicle's ignition and opening the safe, the officer discovered a handgun with a defaced serial number, several bags of marijuana, and several pipes. The officer did not have a warrant to search the vehicle or the safe.

Procedural Background. The State charged the defendant with possession of marijuana with intent to deliver, knowingly transporting a revolver in a vehicle, and failure to affix a drug tax stamp. The defendant filed a motion to suppress the evidence found inside the safe, asserting that the warrantless search of the safe was not justified under the United States and Iowa constitutions. The defendant argued that no threat to the officer's safety existed and there was no danger that potential evidence could be tampered with or destroyed, because the defendant was secured inside the police car at the time of the search. The State resisted the defendant's motion, asserting the warrantless search was valid because it was reasonable to believe the vehicle contained additional evidence of the offense for which the defendant was arrested: possession of marijuana. The district court denied the defendant's motion to suppress, and subsequently convicted him of all three charges. The defendant appealed.

Issue. The Iowa Supreme Court (Court) considered whether the officer's warrantless search of the portable, locked safe inside the vehicle incident to the defendant's arrest violated the defendant's rights under the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Iowa Constitution.

Analysis.

Claims Brought Under the U.S. and Iowa Constitutions. Although the Court recognized that the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Iowa Constitution are nearly identical, the Court reserved the right to apply constitutional principles under the Iowa Constitution differently than the United States Supreme Court applies such principles under the United States Constitution.

Warrantless Vehicle Searches Incident to Arrest Under the U.S. Constitution. A warrantless search is presumed unreasonable unless an exception applies. One such exception applies when the search is incident to a lawful arrest. Upon arresting the occupant of a vehicle, an officer may search the passenger compartment of the vehicle, including any containers found within the compartment, at the time of the arrest. Historically, there are two justifications for this exception: it prevents the arrested person from reaching for a weapon that would endanger the officer, and it prevents the arrested person from tampering with or destroying potential evidence.

In 2009, the United States Supreme Court, faced with the possibility that police officers had come to view warrantless vehicle searches incident to arrest as an entitlement rather than an exception, limited the circumstances under which officers could search vehicles incident to arrest. The United States Supreme Court authorized officers to search vehicles incident to arrest only if the arrested person is within reaching distance of the passenger compartment at the time of the search, or where it is reasonable to believe the vehicle contains evidence of the offense for which the person was arrested.

Warrantless Vehicle Searches Incident to Arrest Under the Iowa Constitution. The Court has previously recognized the search-incident-to-arrest exception, but has not had an occasion to decide whether the United States Supreme Court's 2009 ruling conforms with the protections afforded under the Iowa Constitution. The Court recognized that the United States Supreme Court's "reaching distance" limitation on searches of vehicles incident to arrest was faithful to the two underlying justifications for the exception: officer safety and evidence protection. However, the Court declined to adopt the United States Supreme Court's additional ruling that a search incident to arrest is valid where it is reasonable to believe the vehicle contains evidence of the offense for which the person was arrested. The Court stat-

(Legal Update—Warrantless Vehicle Searches Incident to Arrest continued from Page 8)

ed this additional ruling was not supported by the underlying rationales of officer safety and evidence protection, but rather by a broad evidence-gathering rationale that is incompatible with Iowans' robust privacy rights and fundamentally at odds with the warrant requirement.

Holding. The Court held that the search of the safe in the defendant's vehicle was invalid under Article I, Section 8 of the Iowa Constitution, because the defendant was secured in the police car at the time of the search, and it was not possible for the defendant to access the vehicle to retrieve a weapon or to tamper with or destroy evidence. The Court noted that this holding does not affect the validity of a search incident to arrest under circumstances that implicate officer safety, involve volatile chemicals, or where the arrested person is within reach of contraband.

Dissents. Justice Waterman, joined by Justices Mansfield and Zager, dissented from the majority's opinion. Justice Waterman stated that the search of the safe was valid under the automobile exception to the warrant requirement, which allows an officer to search a vehicle without a warrant where there is probable cause to believe evidence of a crime may be found within the vehicle. He also noted that the majority's ruling presents certain practical problems, such as forcing an officer to choose between inconveniently impounding a vehicle or foregoing a search and potentially leaving evidence undetected. He further suggested that the Court adopt a set of objective criteria for determining when Iowa law should depart from federal law.

Justice Zager, joined by Justices Waterman and Mansfield, also dissented from the majority's opinion. Justice Zager stated that there are not sufficient reasons for the Court to depart from the United States Supreme Court's 2009 ruling, as it placed reasonable limitations on police authority, and struck the proper balance between individual privacy rights and the State's interests.

Concurrences. Chief Justice Cady, joined by Justice Wiggins, concurred with the majority's opinion, and wrote separately to respond to the dissent's argument that the search of the safe was valid under the automobile exception to the warrant requirement. Justice Cady stated that the need for the automatic nature of the exigency justification for the automobile exception may no longer need to exist due to technological advances in Iowa's warrant process.

Justice Appel, joined by Justices Cady and Wiggins, also concurred with the majority's opinion, and wrote separately to respond to issues raised in the dissenting opinions. Justice Appel questioned the use of practical considerations, such as the inconvenience resulting from obtaining a warrant, as a justification to defeat the assertion of constitutional rights. He further noted that the Court should use ordinary tools of constitutional interpretation to determine its approach to constitutional issues, and should not use an "artificial checklist" or a set of neutral criteria that inhibits the Court's ability to interpret the Iowa Constitution. Finally, he questioned the continuing validity of the automobile exception in the face of criticism of its two underlying rationales: that vehicles are inherently mobile and that the owner or occupant of a vehicle has a reduced expectation of privacy.

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