



*Serving the Iowa Legislature*

# IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

September 6, 2018 2018 Interim No. 4

## In This Edition

**Calendar**.....1

**Agenda**.....2

**Briefings**.....3

- Administrative Rules Review Committee (09/11/18)

**Legal Updates**.....6

- Association Health Plans

## September 2018

Sun	Mon	Tue	Wed	Thu	Fri	Sat
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29

## October 2018

Sun	Mon	Tue	Wed	Thu	Fri	Sat
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

Tuesday, September 11, 2018  
**Administrative Rules Review Committee**  
 9:00 a.m., Room 116

*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: Senator Mark Chelgren

Vice Chairperson: Representative Dawn Pettengill

Location: Room 116, Statehouse

Date & Time: Tuesday, September 11, 2018, 9:00 a.m.

LSA Contacts: Jack Ewing, Legal Services, 515.281.6048; Amber Shanahan-Fricke, Legal Services, 515.725.7354.

Agenda: To be announced.

Internet Site: [www.legis.iowa.gov/committees/committee?endYear=2018&groupID=705](http://www.legis.iowa.gov/committees/committee?endYear=2018&groupID=705)

### ADMINISTRATIVE RULES REVIEW COMMITTEE

August 14, 2018

**Chairperson:** Senator Mark Chelgren

**Vice Chairperson:** Representative Dawn Pettengill

### **INSURANCE DIVISION, *Multiple Employer Welfare Arrangements, 7/18/18 IAB, ARC 3894C,* NOTICE.**

**Background.** This rulemaking pertains to Multiple Employer Welfare Arrangements (MEWAs) and sets forth membership stability requirements. The rulemaking also provides for the implementation of the five-year review of the administrative rules in Iowa Administrative Code Chapter 77. The rulemaking proposes rescinding Chapter 77 and adopting a new Chapter 77.

**Commentary.** Ms. Jennifer Lindberg and Ms. Andria Seip represented the Insurance Division in reviewing the rulemaking.

Ms. Lindberg provided opening comments. Ms. Lindberg indicated that the division received 24 comments during the comment period and received seven public, written comments at the public hearing. She stated that the division intends to make nonmaterial changes to the rule prior to adoption based on the following comments. Clarification will be provided to indicate that the rule applies to not only self-insured MEWAs, but also fully insured MEWAs. Additionally, the rule will be clarified to indicate that the requirements apply to any MEWA that wishes to market and offer coverage to Iowa residents, including out-of-state MEWAs. Ms. Lindberg detailed several additional comments that the division is reviewing to determine if the division needs to further clarify the rule. Ms. Lindberg also discussed several comments that were received but for which changes are not going to be made.

Committee members inquired as to the discrepancy between the division's analysis that there would be no fiscal impact and the Legislative Services Agency's (LSA's) analysis that the fiscal impact is unknown. Ms. Seip stated that she is interested in seeing what LSA concludes. In response to an inquiry from committee members, Ms. Seip indicated that interest or participation in MEWAs was not unusually high. Ms. Seip indicated that the division is hoping to provide access to health insurance with MEWAs. In response to an inquiry from committee members, Ms. Seip stated that Iowa is leading the way with MEWAs. Ms. Seip stated that MEWAs used to be more significant in the market many years ago. Ms. Seip indicated that the division worked closely with the National Association of Insurance Commissioners and participated in meetings with the Employee Retirement Income Security Act working group that oversees the MEWAs. Ms. Seip indicated that a big part of working for Iowa is making sure the division's rules are not preempted at the federal level.

Committee members asked the division whether the division was assuming that none of the MEWAs would be self-funded. Ms. Seip indicated that the existing MEWAs are not part of the guaranty association. Ms. Seip stated that they were not anticipating any increase in self-funded MEWAs.

Committee members inquired about subrule 77.7(6) and public comments about fees for withdrawing from a MEWA. Committee members indicated that the committee needed to approve all fees by rule regardless of the market. Ms. Lindberg indicated the reasonable market rate of the penalty depends on the size of the MEWA and would be negotiated when the party joined the MEWA. Ms. Seip stated that existing Iowa MEWA contracts and Nebraska MEWA contracts have a provision providing for a penalty for withdrawing from a MEWA.

**Action Taken.** No action taken.

### **CORRECTIONS DEPARTMENT, *Review and Update of Policies and Procedures, 8/1/18 IAB, ARC 3929C, FILED.***

**Background.** This rulemaking constitutes a comprehensive review and update of policies and procedures pursuant to five-year review of administrative rules under the purview of the Department of Corrections.

**Commentary.** Mr. Michael Savala represented the department and reviewed the rulemaking. Committee members asked how the rulemaking correlates with the Iowa Code, specifically with regard to Community Based Corrections. Mr. Savala stated that the reference to “supervising” was a scrivener’s error that the department intends to correct. In response to an inquiry from committee members, Mr. Savala indicated that he wanted to move forward with the rulemaking; however, he intends to file a new Notice of Intended Action with changes to the same rules that are presently before the committee, including striking “supervising.” Mr. Jerry Evans, Director of the Fifth Judicial District Department of Corrections, indicated that he had an agreement with the department to make changes to the language and he is satisfied that the language changes will be made. Committee members as compared to Mr. Savala and Mr. Evans had overlapping, but also varying, concerns about language that may need to be changed.

Committee members inquired whether there was a written memo documenting the agreement to make changes and sought a timeline for those changes to be made. Mr. Savala confirmed that written documentation exists. Mr. Savala was not able to indicate the exact date he would be able to bring forth a Notice of Intended Action, but stated that he would be able to have the filing ready the week following August 14, 2018. In response to an inquiry from committee members as to the impact of a 70-day delay, Mr. Savala indicated he had not contemplated the impact because he was not coming to the committee seeking a delay. Committee members moved for a 70-day delay of ARC 3929C on the basis that the committee does not allow a rulemaking to go into effect when an agency states it intends to make changes to the same rules. The committee passed the motion and expressed a desire to see the department back before the committee soon.

**Action Taken.** On a vote of 9-0, the Administrative Rules Review Committee issued a 70-day delay of Filed ARC 3929C.

### **REVENUE DEPARTMENT, *Water Service Excise Tax, 7/18/18 IAB, ARC 3896C, NOTICE.***

**Background.** This rulemaking proposes to adopt new Chapter 97 within Title XIII, which establishes rules to administer the water service excise tax passed by the General Assembly in 2018. Specifically, these rules implement sections 10 through 17 of 2018 Iowa Acts, Senate File 512, which exempts certain sales of water from sales tax and enacts Iowa Code chapter 423G, which establishes a water service excise tax.

**Commentary.** Ms. Alana Stamas and Mr. Joe Fraioli represented the Department of Revenue and reviewed the rulemaking.

Ms. Stamas indicated that the department received many comments and concerns prior to the filing of the Notice of Intended Action (NOIA) because the law took effect July 1. Ms. Stamas stated that the topics the rulemaking is trying to cover are who is responsible for collecting the tax and what types of use might be subject to the tax. Since the filing of the NOIA, the department has received additional comments. As a result, the department is in the process of scheduling a public hearing to give the public an additional opportunity to be heard. The department anticipates making changes to the rulemaking

# BRIEFINGS

## INFORMATION REGARDING RECENT ACTIVITIES

---

in advance of the adopted and filed rule to change the policy on who is obligated to collect the tax. Ms. Stamas indicated that the proposed changes will likely resolve the concerns that have been raised. Committee members encouraged the department to be consistent in that if an individual pays their water bill, they pay their water tax. Additionally, the department was encouraged to ensure that if a housing unit is involved, it be run similarly to a mobile home unit, and other similar instances. Ms. Stamas stated that committee members will see that consistency when the rulemaking returns for review.

Committee members asked about the declaratory ruling *In the Matter of Macomb Motel, Inc.*, Docket No. 583 (Sept. 18, 1986) (*Macomb*) and its applicability. Mr. Joe Fraioli spoke on behalf of the department about the applicability of *Macomb*. Mr. Fraioli stated that *Macomb* is not exactly on point but the principle is the same. If an entity is a water utility as defined under the statute, but the water utility is purchasing water from another water utility and it is not breaking it out and separately itemizing it and charging it, then it is not required to collect and remit the tax. Instead, the water utility will purchase that water and pay the tax when it purchases it. Upon inquiry from committee members, Mr. Fraioli confirmed that the rulemaking will be changed to conform to the holding of *Macomb*.

Ms. Emily Piper, representing the Iowa Rural Water Association, expressed support for the rulemaking, specifically that the rule requires an excise tax on the actual sale of water. Mr. Joe Kelly, representing the Iowa Manufactured Housing Association, stated that he received a call from Mr. Fraioli the morning of August 14, 2018. As a result, Mr. Kelly believes that many of his concerns are going to be addressed in the proposed changes. Mr. Kelly expressed appreciation for the department working with him.

**Action Taken.** No action taken.

**Next meeting.** The next committee meeting will be held in Room 116, Statehouse, on Tuesday, September 11, 2018, beginning at 9:00 a.m.

**LSA Staff:** Jack Ewing, Legal Services, 515.281.6048; Amber Shanahan-Fricke, Legal Services, 515.725.7354

Internet Site: [www.legis.iowa.gov/committees/committee?endYear=2018&groupID=705](http://www.legis.iowa.gov/committees/committee?endYear=2018&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 persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.

### ASSOCIATION HEALTH PLANS

#### United States Department of Labor - Employee Benefits Security Administration Final Rule Published June 21, 2018 (Federal Register)

##### Definition of "Employer" Under Section 3(5) of ERISA - Association Health Plans

[www.federalregister.gov/documents/2018/06/21/2018-12992/definition-of-employer-under-section-35-of-erisa-association-health-plans](http://www.federalregister.gov/documents/2018/06/21/2018-12992/definition-of-employer-under-section-35-of-erisa-association-health-plans)

**Background.** An association health plan (AHP) is a multiple employer welfare arrangement (MEWA), as defined in the Employee Retirement Income Security Act (ERISA) (codified at 29 U.S.C. §1001 et seq.), in which two or more small employers band together to sponsor a group health plan to provide health insurance for the employees of the AHP's employer members.

On October 12, 2017, President Trump issued Executive Order No. 13813 directing the Secretary of Labor to consider revising prior United States Department of Labor (DOL) guidance (regulations and DOL advisory opinions) to permit more small employers to join together to form an AHP by expanding the conditions that satisfy "commonality-of-interest" requirements and that promote AHP formation on the basis of common geography or industry.

Under prior DOL guidance, many existing associations do not meet the commonality-of-interest requirements and the regulatory framework requires application of the insurance "look-through" doctrine under which employer members of an AHP are individually rated to determine if they are subject to large group, small group, or individual market rules.

The DOL's final rule expands the commonality-of-interest test in the definition of "employer" under Section 3(5) of ERISA, providing an additional mechanism for groups or associations of employers to be eligible to sponsor a single ERISA-covered group health plan and to be rated based on the number of employees in the entire group or association. All employer members will have access to a large group health plan and the same rates as all other employer members in the group or association.

**Choice of Final Rule or Prior Guidance.** The DOL's final rule is in addition to prior DOL guidance and does not supplant it. Existing AHPs that are in compliance with the DOL's prior guidance are not required to comply with the final rule unless they choose to expand membership in the AHP as permitted by the final rule. AHPs that are established after the final rule may elect to follow either prior DOL guidance or the final rule. An AHP must elect to comply with either prior DOL guidance or the final rule and cannot use a combination of both.

#### Significant Changes for Association Health Plan Compliance Under the Department of Labor's Final Rule Versus Compliance Under Prior Guidance.

# LEGAL UPDATES

**Association Health Plan Purpose.** A group or association of employers can form an AHP for the principal purpose of providing health benefits as long as the group or association has at least one substantial business purpose unrelated to the provision of health benefits. A safe harbor in the final rule provides that a substantial business purpose is considered to exist if the group or association would be a viable entity even in the absence of sponsoring an employee benefit plan. The business purpose does not have to be a for-profit purpose.

Prior DOL guidance prohibits employers from forming an association solely for the purpose of providing health benefits.

**Commonality-of-Interest.** Employer members of the group or association must have a commonality-of-interest based on the same trade, industry, line of business, or profession or maintain a principal place of business within the boundaries of the same metropolitan area or the same state. The metropolitan area, however, may include more than one state.

Prior DOL guidance does not allow the commonality-of-interest to be satisfied solely by a geographical nexus.

**Working Owners.** A “working owner” may qualify as both an employer for membership in an AHP and as an employee for eligibility for participation in the group health plan provided via the AHP. A working owner is defined as an individual who a responsible plan fiduciary reasonably determines has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner or other self-employed individual; who is earning wages or self-employment income from the trade or business for the provision of personal services to the trade or business; and who either works at least 20 hours per week or 80 hours per month or earns wages or self-employment income from such trade or business that at least equals the working owner’s cost of coverage for participation by the working owner and any covered beneficiaries in the group health plan sponsored by the AHP.

Under prior DOL guidance, working owners such as sole proprietors and other self-employed individuals must have at least one common law employee to be eligible to participate in an AHP. Under United States Internal Revenue Service (IRS) guidance, an individual is considered to be a common law employee if an employer can control what work the individual will do and how the individual will do it.

**Nondiscrimination.** An AHP is prohibited from charging different rates to different employer members based on health factors (as defined in 29 C.F.R. §2590.702(a)) of their employees and from varying premiums for individual participants based on a health factor of the participant. Separate groups can be created and experience-rated separately, however, as long as the groups created are legitimate (e.g., full-time versus part-time employees) and are not based on a health factor of one or more individual participants. Examples of legitimate and prohibited groups are provided in 29 C.F.R. §2510.3-5(d)(5).

Prior DOL guidance allows AHPs to condition each employer member’s premiums on its employees’ collective health factors, as long as such rating complies with HIPAA nondiscrimination requirements (29 C.F.R. §2590.702), including the requirement that the AHP does not single out one or more individuals based on a health factor.

**State Authority.** The DOL’s new final rule does not change a state’s ability to regulate fully insured AHPs or to regulate self-insured AHPs to the extent such regulation is not inconsistent with ERISA.

**Effective Date.** The DOL’s new final rule was effective August 20, 2018.

**Staggered Applicability Dates.**

# LEGAL UPDATES

1. New or existing AHPs may establish a fully insured AHP under the new DOL final rule starting on September 1, 2018.
2. Existing AHPs that sponsored a self-insured AHP on or before June 21, 2018, may choose to operate in compliance with the new DOL final rule starting on January 1, 2019.
3. All other new or existing AHPs may establish a self-funded AHP in compliance with the new DOL final rule starting on April 1, 2019.

**Applicability to Iowa Law.** Iowa Code section 507A.4 and 191 IAC 77 establish the State's authority over and regulatory oversight of MEWAs. Senate File 2349, signed into law by Governor Reynolds on April 2, 2018, requires the Commissioner of Insurance to adopt rules for the creation of AHPs that are consistent with the DOL's final rule. The Commissioner must submit a Notice of Intended Action to create new or revised rules to the Administrative Rules Coordinator and the Administrative Code Editor for publication in the Iowa Administrative Bulletin.

The Iowa Insurance Division also has statutory authority to invoke the emergency rulemaking process which allows rules to become effective prior to public participation.

*LSA Monitor:* Kate O'Connor, Legal Services, 515.281.6329