

701—7.28(17A) Waiver of certain department rules. All discretionary rules or discretionary provisions in a rule over which the department has jurisdiction, in whole or in part, may be subject to waiver.

7.28(1) Definitions. The following terms apply to the interpretation and application of this rule:

“Discretionary rule” or *“discretionary provisions in a rule”* means rules or provisions in rules resulting from a delegation by the legislature to the department to create a binding rule to govern a given issue or area. The department is not interpreting any statutory provision of the law promulgated by the legislature in a discretionary rule. Instead, a discretionary rule is authorized by the legislature when the legislature has delegated the creation of binding rules to the department and the contents of such rules are at the discretion of the department. A rule that contains both discretionary and interpretive provisions is deemed to be a discretionary rule to the extent of the discretionary provisions in the rule.

“Interpretive rules” or *“interpretive provisions in rules”* means rules or provisions in rules which define the meaning of a statute or other provision of law or precedent where the department does not possess the delegated authority to bind the courts to any extent with its definition.

“Waiver” means a department action which suspends, in whole or in part, the requirements or provisions of a rule as applied to an identified person on the basis of the particular circumstances of that person.

7.28(2) Scope of rule.

a. This rule creates generally applicable standards and a generally applicable process for granting individual waivers from the discretionary rules or discretionary provisions in rules adopted by the department in situations where no other specifically applicable law provides for waivers. To the extent another more specific provision of law purports to govern the issuance of a waiver from a particular rule, the more specific waiver provision shall supersede this rule with respect to any waiver from that rule.

b. The waiver provisions set forth in this rule do not apply to rules over which the department does not have jurisdiction or when issuance of the waiver would be inconsistent with any applicable statute, constitutional provision or other provision of law.

7.28(3) Applicability of this rule.

a. This rule applies only to waiver of those rules that are within the exclusive rule-making authority of the department. This rule shall not apply to interpretive rules that merely interpret or construe the meaning of a statute, or other provision of law or precedent, if the department does not possess statutory authority to bind a court, to any extent, with its interpretation or construction. Thus, this waiver rule applies to discretionary rules and discretionary provisions in rules, and not to interpretive rules.

b. The application of this rule is strictly limited to petitions for waiver filed outside of a contested case proceeding. Petitions for waiver from a discretionary rule or discretionary provisions in a rule filed after the commencement of a contested case as provided in rule 701—7.16(17A) will be treated as an issue of the contested case to be determined by the presiding officer of the contested case.

7.28(4) Authority to grant a waiver. The director may not issue a waiver under this rule unless:

a. The legislature has delegated authority sufficient to justify the action; and

b. The waiver is consistent with statutes and other provisions of law. No waiver from any mandatory requirement imposed by statute may be granted under this rule.

7.28(5) Criteria for waiver. In response to a petition, the director may, in the director’s sole discretion, issue an order granting a waiver from a discretionary rule or a discretionary provision in a rule adopted by the department, in whole or in part, as applied to the circumstances of a specified person, if the director finds that the waiver is consistent with subrules 7.28(3) and 7.28(4) and if all of the following criteria are also met:

a. The waiver would not prejudice the substantial legal rights of any person;

b. The rule or provisions of the rule are not specifically mandated by statute or another provision of law;

c. The application of the rule or rule provision would result in an undue hardship or injustice to the petitioner; and

d. Substantially equal protection of public health, safety, and welfare will be afforded by means other than that prescribed in the rule or rule provision for which the waiver is requested.

7.28(6) Director's discretion. The final decision to grant or deny a waiver shall be vested in the director. This decision shall be made at the sole discretion of the director based upon consideration of relevant facts.

7.28(7) Burden of persuasion. The burden of persuasion shall be on the petitioner to demonstrate by clear and convincing evidence that the director should exercise discretion to grant the petitioner a waiver based upon the criteria contained in subrule 7.28(5).

7.28(8) Form and contents of petition.

a. Department forms. A petition for waiver may be filed using the form available on the department's portal, GovConnectIowa. Alternatively, a petition for waiver may be filed using the form available on the department's website, tax.iowa.gov/forms.

b. Manually created petitions.

(1) Persons that do not use the department's portal, GovConnectIowa, or the form available on the department's website shall follow the following format:

| IOWA DEPARTMENT OF REVENUE | | |
|----------------------------|---|------------------|
| Name of Petitioner | * | PETITION FOR |
| Address of Petitioner | * | WAIVER |
| Type of Tax at Issue | * | Docket No. _____ |
| | * | |

(2) A manually created petition for waiver must contain all of the following, where applicable and known to the petitioner:

1. The name, address, email address, telephone number, and case number or state identification number of the entity or person for whom a waiver is being requested;
2. A description and citation of the specific rule or rule provisions from which a waiver is being requested;
3. The specific waiver requested, including a description of the precise scope and operative period for which the petitioner wants the waiver to extend;
4. The relevant facts that the petitioner believes would justify a waiver. This statement shall include a signed statement from the petitioner attesting to the accuracy of the facts represented in the petition, and a statement of reasons that the petitioner believes will justify a waiver;
5. A complete history of any prior contacts between the petitioner and the department relating to the activity affected by the proposed waiver, including audits, notices of assessment, refund claims, appeals, contested case hearings, or investigative reports relating to the activity within the last five years;
6. Any information known to the petitioner relating to the department's treatment of similar cases;
7. The name, address, and telephone number of any public agency or political subdivision which might be affected by the granting of a waiver;
8. The name, address, and telephone number of any person or entity that would be adversely affected by the granting of the waiver;
9. The name, address, and telephone number of any person with knowledge of the relevant facts relating to the proposed waiver;
10. Signed releases of information authorizing persons with knowledge of relevant facts to furnish the department with information relating to the waiver; and
11. Signature by the petitioner at the conclusion of the petition attesting to the accuracy and truthfulness of the information set forth in the petition.

7.28(9) Filing of petition. A petition for waiver must be filed using one of the methods described in subrule 7.3(1).

7.28(10) Additional information. Prior to issuing an order granting or denying a waiver, the director may request additional information from the petitioner relating to the petition and surrounding circumstances. The director may, on the director's own motion, or at the petitioner's request, schedule

a telephonic or in-person meeting between the petitioner or the petitioner's representative, or both, and the director to discuss the petition and surrounding circumstances.

7.28(11) Notice of petition for waiver. The petitioner shall provide, within 30 days of filing the petition for waiver, a notice consisting of a concise summary of the contents of the petition for waiver and stating that the petition is pending. Such notice shall be mailed by the petitioner to all persons entitled to such notice. Such persons to whom notice must be mailed include, but are not limited to, the director and all parties to the petition for waiver, or the parties' representatives. The petitioner must then file written notice to the department's legal services section by mail to the address listed in paragraph 7.3(1) "c" or by email to the address provided in paragraph 7.3(1) "b," attesting that the notice has been mailed. The names, addresses and telephone numbers of the persons to whom the notices were mailed shall be included in the filed written notice. The department has the discretion to give such notice to persons other than those persons notified by the petitioner.

7.28(12) Ruling on a petition for waiver. An order granting or denying a waiver must conform to the following:

a. An order granting or denying a waiver shall be in writing and shall contain a reference to the particular person and rule or rule provision to which the order pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the narrow and precise scope and operative time period of a waiver, if one is issued.

b. Conditions. The director may condition the grant of a waiver on any conditions which the director deems to be reasonable and appropriate in order to protect the public health, safety and welfare.

7.28(13) Time period for waiver; extension. Unless otherwise provided, an order granting a petition for waiver will be effective for 12 months from the date the order granting the waiver is issued. Renewal of a granted waiver is not automatic. To renew the waiver beyond the 12-month period, the petitioner must file a new petition requesting a waiver. The renewal petition will be governed by the provisions in this rule and must be filed prior to the expiration date of the previously issued waiver or extension of waiver. Even if the order granting the waiver was issued in a contested case proceeding, any request for an extension shall be filed with and acted upon by the director. However, renewal petitions must request an extension of a previously issued waiver. Granting the extension of the waiver is at the director's sole discretion and must be based upon whether the factors set out in subrules 7.28(4) and 7.28(5) remain valid.

7.28(14) Time for ruling. The director shall grant or deny a petition for waiver as soon as practicable but, in any event, shall do so within 120 days of its receipt, unless the petitioner agrees in writing to a later date or the director indicates in a written order that it is impracticable to issue the order within the 120-day period.

7.28(15) When deemed denied. Failure of the director to grant or deny a waiver within the 120-day or the extended time period shall be deemed a denial of that petition.

7.28(16) Service of orders. Within seven days of its issuance, any order issued under this rule shall be transmitted to the petitioner or the person to whom the order pertains and to any other person entitled to such notice by any provision of law.

7.28(17) Record keeping. The department is required to maintain a record of all petitions for waiver and rulings granting or denying petitions for waiver.

a. *Petitions for waiver.* The department shall maintain a record of all petitions for waiver available for public inspection. Such records will be indexed and filed and made available for public inspection.

b. *Report of orders granting or denying a waiver.* All orders granting or denying a waiver shall be submitted on the Internet site as prescribed in Iowa Code section 17A.9A.

7.28(18) Cancellation of waiver. A waiver issued pursuant to this rule may be withdrawn, canceled, or modified if, after appropriate notice, the director issues an order finding any of the following:

a. The person who obtained the waiver order withheld or misrepresented material facts relevant to the propriety or desirability of the waiver; or

b. The alternative means for ensuring that public health, safety, and welfare will be adequately protected after issuance of the waiver order have been demonstrated to be insufficient, and no other means exist to protect the substantial legal rights of any person; or

c. The person who obtained the waiver has failed to comply with all of the conditions in the waiver order.

7.28(19) *Violations.* A violation of a condition in a waiver order shall be treated as a violation of the particular rule or rule provision for which the waiver was granted. As a result, the recipient of a waiver under this rule who violates a condition of the waiver may be subject to the same remedies or penalties as a person who violates the rule or rule provision at issue.

7.28(20) *Defense.* After an order granting a waiver is issued, the order shall constitute a defense, within the terms and the specific facts indicated therein, for the person to whom the order pertains in any proceeding in which the rule in question is sought to be invoked, unless subrules 7.28(18) and 7.28(19) are applicable.

7.28(21) *Hearing and appeals.*

a. Appeals from a decision granting or denying a waiver in a contested case proceeding shall be in accordance with the rules governing hearings and appeals from decisions in contested cases. These appeals shall be taken within 30 days of the issuance of the ruling granting or denying the waiver request, unless a different time is provided by rule or statute, such as provided in the area of license revocation (see rule 701—7.39(17A)).

b. The provisions of Iowa Code sections 17A.10 to 17A.18A and rule 701—7.19(17A) regarding contested case proceedings shall apply to any petition for waiver of a rule or provisions in a rule filed within a contested case proceeding. A petition for waiver of a provision in a rule outside of a contested case proceeding will not be considered under the statutes or rule 701—7.19(17A). Instead, the director's decision on the petition for waiver is considered to be "other agency action."

This rule is intended to implement Iowa Code section 17A.9A.
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