



# THE RULES DIGEST

August 2011

Scheduled for Committee review  
**August 16 and 17, 2011**  
**Room #116**

Reference  
XXXIII IAB No. 24(06/29/11)  
XXXIV IAB No. 01(07/13/11)  
XXXIV IAB No. 02(07/27/11)

## HIGHLIGHTS IN THIS ISSUE:

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TUESDAY, AUGUST 16TH, 2011

## NATURAL RESOURCES DEPARTMENT

9:35

*Mourning dove season*, EMERGENCY AFTER NOTICE, SPECIAL REVIEW.

2011 Acts, Senate File 464 added the mourning dove to the list of game birds or animals for which the Natural Resources Commission may establish a hunting season. The Commission states that the new season will have a positive effect on Iowa’s economy, with Iowa hunters spending \$104/day hunting upland game. The Commission estimates a potential for 67.5 to 90 new jobs.

With this specific statutory authorization, the Commission adopted the following season:

571--97.6(481A) Mourning Dove season. Open season for hunting mourning doves shall begin on September 1 and continue for 70 consecutive days. Shooting hours shall be from one-half hour before sunrise to sunset each day. Daily bag limit is 15; possession limit is 30. The entire state is open. ***No person shall take a mourning dove or a Eurasian collared-dove on any land or water of the state of Iowa while having in one’s possession any shot other than nontoxic approved by U.S. Fish and Wildlife Service [emphasis added].***

The Commission held its public hearing on May 24, 2011. The Commission received significant comments from stakeholders favoring a ban on the use of “toxic shot” in dove hunting. On adoption this additional language, set out in bold italics, was added to the

adopted rule. That language did not appear in the notice of intended action. The adopted rule is effective August 17th, 2011. Nontoxic shot is otherwise required only on wildlife management areas and when hunting migratory game birds.

The issue presented in this filing is whether the last sentence could be properly added in the final adoption, without prior notice and an opportunity for oral presentation. Professor Arthur Bonfield, the author of much of Iowa's Administrative Procedures Act, has offered a three part test to determine whether revised language is within the scope of the original notice:

- a. The extent to which an individual concerned with the adopted rule should have understood that the proposed rule could have affected their interests;
- b. The extent to which the subject matter or issues involved in the adopted rule differed from those of the proposed rule; and
- c. The extent to which the effects of the adopted rule differed from the effects that would have occurred if the proposed rule had been adopted.

## PHARMACY BOARD

10:45

*Pharmacy closing*, IAB Vol. XXXIII, No. 24, ARC 9526B, 70-DAY DELAY, JUNE.

This rule making was initially reviewed in June. It contains a variety of amendments to the Board's rules. A new provision which establishes a procedure for closing a pharmacy and the transfer of records to the receiving pharmacy received a 70-day delay. The rules require that the closing pharmacy ensure the transfer of all patient records to a pharmacy that is held to the same standards of confidentiality as the closing pharmacy and that agrees to act as custodian for the closing pharmacy's records for the retention periods required under law.

These procedures require the closing pharmacy to notify the Board and the federal Drug Enforcement Administration (DEA) at least 14 days prior to the closing and to notify the pharmacist in charge of the closing pharmacy at least 21 days prior to the closing and to notify the patients of the closing at least 14 days prior to the date of closing, including information regarding a patient's right to transfer the patient's records to a pharmacy of the patient's choosing. The new rules also restrict the receiving pharmacy from contacting patients prior to the transfer of patient records and the closure of the closing pharmacy. In June, concerns were raised that the new patient notice requirement was inappropriate, as it might encourage patients to switch pharmacies upon such a purchase, which would diminish the value of the purchased

pharmacy. Concerns were also raised about the confidentiality of patient records under such circumstances, and whether 14 days was a sufficient notice period. A 70-day delay was imposed to allow these issues to be examined further.

## HISTORICAL DIVISION

11:10

*Rehabilitation tax credit program, IAB Vol. XXXIV, No. 01, ARC 9608B, EMERGENCY.*

This filing relates to the administration of the historic preservation property rehabilitation tax credit program administered by the Department of Cultural Affairs; it implements 2011 Acts, Senate File 521. The legislation makes a variety of changes to the administration of the preservation program. Under prior law, property classified as residential or commercial with multifamily residential units may not exceed 10 \$100,000 in rehabilitation costs used per residential unit. The Act eliminates this requirement. The prior program used a 24-month period for determining the costs that qualify for computing the amount of the tax credit. The Act provides for a rehabilitation period commencing from the date the first qualified rehabilitation cost is incurred and ending with the end of the taxable year in which the property is placed in service. All rehabilitation projects were to be completed and placed in service within 36 months of approval, while the Act allows projects up to 60 months to be completed. These changes are retroactive to July 1, 2009.

These rule filings are also published as a notice of intended action.

## HUMAN SERVICES DEPARTMENT

1:00

*Medicaid Filings, emergency adoption, Special review.*

Each year the Department of Human Services is authorized in statute to adopt a variety of changes to the Medicaid program on an “emergency” basis, with the proviso that the changes be reviewed by the Administrative Rules Review Committee before they are effective. The 2011 legislation, House File 649, stated in part:

20. a. The department may implement cost containment strategies recommended by the governor, and may adopt emergency rules for such implementation.

b. The department shall not implement the cost containment strategy to require a primary care referral for the provision of chiropractic services.

Due to the extended legislative session, the timeframe for the drafting and review of these Medicaid rules was significantly restricted; 14 rule filings were sent to the Committee and reviewed at the July meeting. Of these documents, three proposals

were controversial. Filing number 5 limited respite care to 48 hours per month; hours not used within the month are lost. The Committee heard extensive testimony from service providers and parents who emphasized the need for continued service. This proposal has been eliminated.

Filing number two eliminated Medicaid coverage for bariatric surgery. Stakeholders contended that this surgery is only provided to persons who are morbidly obese, and is a lifesaving measure. This filing has been eliminated,

Filing number four restricts coverage of orthodontia for children. Industry representatives argued that the filing does not properly recognize the value of the orthodontia services offered, as these particular procedures are not merely cosmetic in nature, but an important form of preventive care. This filing has NOT been withdrawn. The August filings can be summarized as follows:

- Chapter **75**, Medicaid. Allow liens to recover Medicaid expenses for services involving malpractice. **EFFECTIVE 9-1-2011**
- Chapter **78**, Medicaid. Eliminate coverage for weight-loss drugs and limit coverage of drugs for symptomatic relief of cough and cold. **EFFECTIVE 9-1-2011**
- Chapter **78**, Medicaid. Restrict coverage of orthodontia for children. **EFFECTIVE 9-1-2011**
- Chapter **78**, Medicaid. Limit payment for durable equipment under an HCBS waiver to the amount paid for fee-for-service Medicaid. **EFFECTIVE 9-1-2011**.
- Chapter **79**, Medicaid. Increase reimbursement rates for home- and community-based waiver services. **EFFECTIVE 8-17-2011**
- Chapter **79**, Medicaid. Increase pharmacy dispensing fee. **EFFECTIVE 8-17-2011**
- Chapter **79**, Medicaid. Increase reimbursement rates for non-state-owned psychiatric medical institutions for children. **EFFECTIVE 8-17-2011**
- Chapter **79**, Medicaid. Eliminate graduate medical education payments for out-of-state hospitals. **EFFECTIVE 9-1-2011**
- Chapter **79**, Medicaid. Eliminate payment for treatment of a hospital-acquired condition. **EFFECTIVE 9-1-2011**
- Chapter **79**, Medicaid. Reduce physician payment for services provided in a facility setting. **EFFECTIVE 9-1-2011**
- Chapter **79**, Medicaid. Implement emergency room copayment and reduce Medicaid payment when service is nonemergency and patient is not referred by another provider. **EFFECTIVE 9-1-2011**

- Chapter **80**, Medicaid. Require new forms for paper billing of Medicare crossover claims. **EFFECTIVE 9-1-2011**
- Chapter **81**, Medicaid. Update procedures for federal nursing facility preadmission screening and evaluation of patients with mental retardation or mental illness. **EFFECTIVE 9-1-2011**

These documents were adopted by the Human Services Council on August 10th.

**WEDNESDAY, AUGUST 17TH, 2011**  
**PUBLIC HEALTH DEPARTMENT**

10:00

*Plumbing licensure*, IAB Vol. XXXIV, No. 01, ARC 9603-9605B, EMERGENCY.

2011 Iowa Acts, House File 392 revises the Iowa Plumber, Mechanical Professional, and Contractor Licensing Act (Code chapter 105). The Act revises the licensing fees and waives renewal fees for licenses issued from January 1, 2011 through December 31, 2012.

The Act exempts persons from licensing requirements who are performing work on a volunteer, non-paid basis or assisting a property owner performing non-paid work on the owner's principal residence. The Act also exempts certain veterans of the armed forces from the testing and experience requirements if the person provides documentation that shows the applicant has previously passed an examination which the board deems substantially similar to the examination for a journey person license or a master license, as applicable, issued by the board, or provides documentation that shows the applicant has previously been licensed by a state or local governmental jurisdiction in the same trade and trade level.

The Act provides that local governments shall not impose any fee or charge on any individual or business licensed by the board for the right to perform work within the scope of the license.

These rule filings are also published as a notice of intended action.

**PUBLIC SAFETY DEPARTMENT**

10:35

*E-85 fuel dispensers*, IAB Vol. XXXIV, No. 2, ARC 9620B, FILED.

This rule making was both noticed and filed emergency. The emergency rules, which became effective December 1, 2010, will be rescinded when the noticed rules become effective September 1. Iowa Code chapter 101 establishes the authority of the State Fire Marshal to establish requirements for the safe transportation, storage, handling, and use of flammable and combustible liquids, which include motor vehicle fuels such as gasoline, “traditional” ethanol (90% gasoline, 10% ethanol), and higher blends of ethanol, including E-85. Generally, dispensers used for motor vehicle fuels are required to be “listed” by an independent testing laboratory for use with the fuel dispensed. However, there has not, until recently, been a dispenser available which was listed for use with E-85.

Iowa Code section 455G.31 requires the State Fire Marshal to monitor the potential availability of dispensers listed for use with E-85 and to issue an order regarding the use of listed dispensers once they become commercially available. Recently, the State Fire Marshal was notified of the commercial availability of two dispensers listed for use with E-85 and issued an order regarding the use of those dispensers. 60 days after the issuance of the order, any new dispensers installed for use with E-85 must be listed for this use, and four years after the issuance of the order, E-85 may be dispensed only from dispensers listed for use with E-85. These rules codify the terms of the order issued by the State Fire Marshal. The rules also modify the definition of “E-10” to include blends of gasoline and ethanol up to 16 % ethanol, rather than 15.

In response to feedback from stakeholders received since these rules were noticed, an option has been added to the conditions under which blends of biodiesel fuel containing between 6 and 20 percent biodiesel may be dispensed when a dispenser listed by an independent testing laboratory is not used. This option provides that dispensing may take place when insurance coverage is in place and the owner or operator is able to document the coverage. Certain definitions were modified as well.

## **PROFESSIONAL LICENSURE DIVISION**

11:00

*Licensee discipline: effect of deferred conviction or sentence, various licensing boards.*

Iowa’s licensing boards are adopting new disciplinary rules which would allow the boards to consider deferred judgments and deferred sentences as factors in licensee

disciplinary matters. A representative from the Attorney General, appearing on behalf of the Division explained that these rules were needed in light of an Iowa Supreme Court decision, and that it is necessary for deferred judgments and deferred sentences to be explicitly set out as permissible factors for consideration in order for licensing boards to be able to consider them when making disciplinary decisions. The representative also noted that the number of deferred judgments has been increasing in recent years. In response to questioning, the representative stated that the underlying offense must be related to the particular profession under a case-by-case analysis.

Committee members asked why there were differences between boards in the language used to implement this change. The representative explained that the rules were tailored to the specifics of each profession, but that greater consistency would be considered. Regarding deferred convictions, Committee members expressed concern about the fairness of a person being denied a license without having been convicted of a crime. Concerns were also raised that the loss of occupation that would result from the denial of a license might lead a person to reoffend. Board representatives have stated that boards consider all the facts when making these decisions.

## **NURSING BOARD**

11:00

*Board organization and operation, IAB Vol. XXXIV, No. 02, ARC 9621B, NOTICE.*

The Board of Nursing proposes to revise its rules of procedure. One change would eliminate any reference to “Robert’s Rules of Order, Revised”; Roberts is the traditional authority used by state boards and commissions to govern meetings. This action means that the Board would operate with only limited rules of procedure, set out in chapter one, along with the requirements of Iowa Code chapter 21, Iowa’s Open Meeting Law.

Issues that exceed the scope of those skeletal procedures would be dealt with on an ad hoc basis.

## **LOTTERY**

No Rep. Requested

*Drawings & contests, IAB Vol. XXXIV, No. 01, ARC 9611B, EMERGENCY.*

The Lottery’s’ VIP Club is a promotional program allowing non-winning tickets to be entered again for “Play It Again” drawings and other special second-chance promotions. There is no additional charge for the re-entry. For the special second-chance promotions, participants get entries in that promotion and the Play It Again drawings.

Every entry submitted earns points that can be redeemed for items in the Lottery's' online store. The enhanced VIP Club began on May 16, 2011.

These rule filings are also published as a notice of intended action.