

### **ADMINISTRATIVE RULES REVIEW COMMITTEE**

December 7, 2018

**Chairperson:** Senator Mark Chelgren

**Vice Chairperson:** Representative Dawn Pettengill

### **PUBLIC HEALTH DEPARTMENT, *Vital Records*, 11/21/18 IAB, ARC 4127C, NOTICE.**

**Background.** The proposed amendments will affect the process to establish a vital record event and the process to amend a vital record. They will also ensure that vital record fees are assessed per record issued and not per search performed. Additionally, a definition of “doula” is added and language is added to protect the registrant of vital records to ensure that entitlement to a certified copy of any vital record is for the benefit of the person listed on the vital record. Entitlement to a certified copy of a vital record by legal representatives must be on behalf of an entitled family member and also for the benefit of the person on the record. Proposed is a requirement that a doula or a midwife must report a home birth. Additionally, processes are outlined to establish a delayed marriage record through the court system, to amend a certificate of vital record through the court system, and to allow for a person to amend a vital record using an established vital record on file.

**Commentary.** Ms. Susan Dixon and Ms. Melissa Bird represented the department and responded to feedback and questions from the committee. Committee members expressed that they expected the rulemaking to be improved upon a second review. Specifically, committee members noted that the definition of “doula” likely unintentionally encompassed individuals who would not want to be considered a doula because the definition does not include a requirement that the person be hired or designated as a doula. Committee members inquired whether that was the intention of the department. Ms. Bird indicated that the intention of the rule was to ensure that any individual assisting a birthing mother during labor is primary in reporting to the state registrar that birth secondary to the parent. Committee members inquired whether a mother-in-law assisting in a birth would be considered a doula. Ms. Bird stated she would look into the issue.

Committee members and Ms. Bird also briefly discussed fees for services provided by a state registrar or county registrar, overpayments, non-institution births, delayed marriage certificates, and amendments of vital records by an order to amend the record by a court of competent jurisdiction. Committee members advised that if specific language must be in a court order in order to amend a birth certificate, the department should provide the language in rule.

**Action.** No action taken.

### **BOARD OF NURSING, *Advanced Registered Nurse Practitioners*, 11/21/18 IAB, ARC 4132C, NOTICE.**

**Background.** The board proposes a new Iowa Administrative Code chapter to clarify and add new definitions; streamline the requirements and process for licensure as an advanced registered nurse practitioner (ARNP); clarify the role and expectation of the ARNP per the Consensus Model and the current standards of practice; and provide new language on the standards of practice for treating patients, the standards of practice for the prescribing and administering of controlled substances, and the ability of the ARNP to enter into collaborative practice agreements with pharmacists.

**Commentary.** Ms. Kathy Weinberg represented the board and responded to feedback and questions from the committee and the public. Committee members inquired what problem this rulemaking is solving. Ms. Weinberg responded by stating that the rulemaking is making sure ARNPs practice within

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their role and the population in which they specialized and have been certified and making sure that they meet the current standards of care based on their professional certifying body, their professional organization, and their education and experience.

Mr. Dennis Tibben, representing the Iowa Medical Society (IMS), stated the IMS and the medical community at large are extremely concerned by the rulemaking. He stated that ARNPs had no clearly defined statutory scope of practice act and there is only a single line of statute in the Iowa Code. He stated that there has been no involvement by the medical community in the development of the rulemaking. Mr. Tibben urged legislative involvement prior to any rulemaking. In response, committee members encouraged the board to engage the medical community to advance the rulemaking. Mr. Kevin Kruse, representing the Iowa Association of Anesthesiology, spoke against the rulemaking, arguing that there has been no new grant of rulemaking authority from the General Assembly.

The following organizations were represented at the meeting and spoke in support of the rulemaking: Iowa Association of Nurse Anesthetists, Iowa Nurses Association, Iowa Pharmacy Association, and Iowa Association of Nurse Practitioners. Ms. Lynn Boes, representing the Iowa Nurses Association, spoke in favor of the rulemaking and argued that the Iowa Supreme Court in *Iowa Medical Society v. Iowa Board of Nursing*, 831 N.W.2d 826 (Iowa 2013) held that the board has the legal authority to determine the proper nursing scope of practice without the input of other medical professionals. In other words, the board does not need to consult physicians in the course of the board's rulemaking process.

Committee members encouraged the board to identify the parts of the rulemaking that are controversial and report to the committee at the next review which would permit the committee to execute a delay on only the parts of the rulemaking that are controversial, thus allowing the parts of the rulemaking that are not controversial to go into effect.

**Action.** No action taken.

### **DEPARTMENT OF REVENUE, *Personal Transportation Service*, 11/7/18 IAB, ARC 4108C, NOTICE.**

**Background.** This rulemaking implements the imposition of sales tax on personal transportation services pursuant to 2018 Iowa Acts, Senate File 2417. The rulemaking defines personal transportation services, addresses sourcing of personal transportation services, and describes applicable exemptions.

**Commentary.** Mr. Matt Eide made a public comment on behalf of Uber. He stated that Uber wants to work collaboratively with the department on these rules as Uber has done in other states. He stated that Uber and the department have had a series of meetings and telephone conversations since June to discuss three concerns. First, Uber wants to collect the tax itself, rather than have its drivers collect the tax. Uber wants language to that effect included in the rulemaking. Second, Uber is concerned that it will be subject to new marketplace facilitator rules from the department, which Uber feels would amount to double taxation. The rules are supposed to be effective soon, but the department has only issued guidance thus far. Third, Uber wants to ensure equality between Uber and taxi cab companies in the department's rules. He stated that if Uber's concerns are not resolved by the end of December, Uber will not collect sales tax itself, and the department will have to pursue collection from its drivers. He also explained how the Uber application would process the sales tax if Uber collects the tax.

Department representative Mr. Tim Reilly clarified that only sales tax is at issue in this rulemaking, not any other taxes. Committee members asked why the department had not addressed Uber's concerns. Mr. Reilly explained that the department agrees with Uber that Uber and not its drivers should collect the sales tax and feels that the proposed rules reflect that already. He stated that the department is

willing to continue to discuss this with Uber, but the department has maintained this position since June. Committee members asked about the department's time frame for implementing the marketplace facilitator rules, and Mr. Reilly explained that the department hopes to have the rules in place by the 2019 Legislative Session. He explained that the department has a limited number of personnel who can write rules, but guidance on marketplace facilitators will be included on a website the department has created containing guidance on the implementation of Senate File 2417.

Committee members asked if a session delay imposed on this rulemaking upon adoption if Uber's concerns are not resolved would cause any problems with the implementation of Senate File 2417. Mr. Reilly explained that the sales tax at issue is imposed by statute and would still apply; the rules only clarify the statute. Committee members asked if the department would adopt Uber's preferred language to resolve the issue, and Mr. Reilly stated the department is open to that. Committee members also asked why there remained so much uncertainty regarding the department's expectations about compliance with these sales tax changes, and Mr. Reilly stated that the department's guidance should help alleviate any uncertainty. In response to additional questions, Mr. Reilly explained that this rulemaking does not affect Netflix, that the sales tax at issue will be imposed starting January 1, 2019, and that the language at issue is the definition of "personal transportation service" and a cross reference to Iowa Code chapter 321N, which regulates transportation companies.

In additional discussion amongst committee members, Mr. Eide, and Mr. Reilly, Mr. Eide explained that Uber wants language added to the rulemaking that makes clear that the sales tax is to be collected by Uber itself because Uber's attorneys do not currently believe the statute or rulemaking clearly requires that. He stated that Uber wants to collect the sales tax, but will not do so without further clarifying language. Mr. Reilly stated that Uber had no concerns about collecting the sales tax when their discussions began in June, before the rulemaking was drafted.

Mr. Scott Weiser made a public comment on behalf of Mr. Randy Sackett, owner of Trans Iowa, which operates Yellow Cab. He explained that his client leases vehicles to drivers who are independent contractors and does not think the statute or rulemaking applies to his company at all. He explained that his client has sought a declaratory ruling about this from the department and is concerned about the possible effects of the department's marketplace facilitator rulemaking. He stated that his client will not collect sales tax.

Committee members urged the department to provide greater clarity to the public on these matters. Committee members suggested that the department implement a two-tiered sales tax system that differentiates between businesses providing services via the Internet and traditional businesses and that businesses providing services via the Internet should, as fiduciaries, collect sales tax themselves. Committee members acknowledged that the department may lack statutory authority to pursue such an approach.

**Action.** No action taken.

### **DEPARTMENT OF REVENUE, *Exemptions Primarily Benefiting Manufacturers and Other Persons Engaged in Processing*, 11/7/18 IAB, ARC 4109C, NOTICE.**

**Background.** This rulemaking implements changes in the definitions of "manufacturer," "manufacturing," and related terms for the purposes of sales tax exemption pursuant to 2018 Iowa Acts, Senate File 2417.

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**Commentary.** Department representative Mr. Tim Reilly summarized the various public comments the department had received about the rulemaking and explained that some concerns raised would require statutory changes while a request to modify a rebuttable presumption relating to retail sales will be addressed when the rulemaking is adopted. Committee members asked Mr. Reilly to discuss any statutory changes that might be needed with the chairpersons and ranking members of the Senate and House Ways and Means Committees, and he agreed.

Committee members asked if an entity that largely engages in manufacturing would lose the sales tax exemption for manufacturing if the entity engages in any construction, given that construction is not eligible for the exemption under the statute. Mr. Reilly confirmed that manufacturers would lose the exemption if they engage in any construction and noted that the department is seeking to clarify this in the rulemaking. He stated that a statutory change would be necessary to completely resolve the issue. Committee members asked if the exclusion of construction contractors from the manufacturing exemption would apply to a manufacturer who provides logistics support at a job site at which construction is going on, and Mr. Reilly explained that it would not as long as the manufacturer was complying with the statutory requirements for the exemption. Committee members asked if the exemption would apply to a manufacturer engaged in an industry such as roofing if the manufacturer's employees demonstrate to a customer how a roofing project should be carried out, and Mr. Reilly stated that he would need to look into that further.

Ms. Jennifer Kingland made a public comment on behalf of the Iowa Taxpayers Association. She stated that she just received a revised version of the rulemaking from the department and would need to review it before commenting further, but she appreciated the department's work on the matter.

Ms. Nicole Crain made a public comment on behalf of the Association of Business and Industry. She stated that there are still some issues with the rulemaking, but she is reviewing the department's proposed changes to the rulemaking. She stated that she would like to see some clarification regarding the treatment of an entity commonly understood to be a manufacturer that does some consulting on a construction project.

Ms. Christine Hayes made a public comment on behalf of Lifeserve Blood Center. She explained that Lifeserve had strongly opposed Senate File 2417 because it excluded nonprofit organizations, which include Lifeserve, from the definition of "manufacturer," making them ineligible for tax exemptions applicable to manufacturers for which they had previously been eligible. She stated that Lifeserve is considered a manufacturer under federal law and explained how the process of processing donated blood and preparing it for another person to receive involves manufacturing. She also expressed concern about Senate File 2417 imposing tax liability for software used by Lifeserve. She stated that Senate File 2417 imposes \$750,000 in new taxes on Lifeserve's equipment. She stated that for-profit blood centers still receive the exemption. She stated that Iowa is now the worst state in the country to be a nonprofit blood center and is one of only three states that taxes nonprofit blood centers. She asked that blood centers and organ procurement organizations receive a statutory sales tax exemption and described how such an exemption could be drafted. She stated that Lifeserve is one of only two nonprofit blood centers in Iowa, employs 350 employees, and provides 99 percent of blood required for transfusions by Iowans. Committee members asked Ms. Hayes to provide her proposed language to the committee. Committee members asked Mr. Reilly if the department interprets the statutory language relating to blood centers the same way as Lifeserve does regarding their ineligibility for the tax exemption, and he agreed.

**Action.** No action taken.

### **ADMINISTRATIVE SERVICES DEPARTMENT, *Update of Human Resources Policies and Procedures*, 11/21/18 IAB, ARC 4122C, NOTICE; ARC 4121C, FILED EMERGENCY.**

**Background.** These rules are being amended to update policies and procedures relating to reporting and investigation of sexual harassment, discrimination, equal opportunity, and affirmative action complaints in the State of Iowa Executive Branch. The amendments provide that complaints may be made directly to the Department of Administrative Services or the Office of the Governor, rather than just within an agency. They also provide that the department shall conduct investigations of such conduct unless otherwise directed by the Office of the Governor. In addition, the amendments clarify the confidentiality of the complaint and investigation process.

**Commentary.** Ms. Tami Wiencek and Director Janet Phipps represented the department and responded to inquiries from committee members. Committee members inquired why suggestions made during the emergency meeting on October 25, 2018, were not implemented. Director Phipps stated that the suggestions, including whether to make training mandatory, were under consideration by the Governor's Office. Committee members stated that the definition in the rulemaking of sexual harassment does not reflect the Iowa Code and accused Director Phipps of misrepresenting that it did reflect the Iowa Code. Director Phipps responded that she did represent that it reflected the law. She stated she would look into the committee members' assertion that it was not a complete and accurate representation of the law. Committee members stated that they were still waiting to find out how many harassment complaints have been filed against the state. Director Phipps stated that the Attorney General would be responding and would state that information is confidential. Committee members expressed a preference that violation of sexual harassment or retaliation policies result in a policy that a person "shall be subject to discipline" rather than "may be subject to discipline." Director Phipps responded that routinely department policies say "may be subject to discipline" but most of the time some level of discipline is administered. Committee members disagreed with that approach. Additionally, committee members admonished the department regarding the rules in general; stating that the rules were a "sham" and that the department should have done better. Committee members also requested that the rules provide for an option for an external investigation. In response, Director Phipps stated that the policies provide that an employee may file an external complaint with the Iowa Civil Rights Commission or the Equal Employment Opportunity Commission, which may investigate. Mr. Sam Langholz, Administrative Rules Coordinator and ex officio, nonvoting member of the committee, clarified that these rulemakings were filed the same day as the emergency rulemaking was approved by the committee, the day of the emergency meeting, which is why the rulemakings do not incorporate suggested changes. Committee members stated that they look forward to the department coming back to the committee with suggestions incorporated.

Mr. Daniel Zeno spoke on behalf of the American Civil Liberties Union of Iowa. He stated that the emergency rules narrowed the definition of sexual harassment under Iowa Code chapter 19. He proposed that these rules should, at the very least, go as far as the pre-emergency rules. He proposed mandatory training for all state employees for every protected class under the Iowa Civil Rights Act. Mr. Zeno stated that the emergency rules provide limited direction for state agencies other than the department and indicated that there are no timelines or requirements for documentation. He stated that the objective of administrative rules should be to provide clarity. He urged the department to provide timelines and establish expectations for parties in the rules.

**Action.** No action taken.

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**Next Meeting.** The next committee meeting will be held in Room 116, Statehouse, on Tuesday, January 8, 2019, 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)