

**ALCOHOLIC BEVERAGES DIVISION[185]**

**Notice of Intended Action**

**Proposing rule making related to waivers and providing an opportunity for public comment**

The Alcoholic Beverages Division hereby proposes to amend Chapter 19, “Waivers from Rules,” Iowa Administrative Code.

*Legal Authority for Rule Making*

This rule making is proposed under the authority provided in Iowa Code sections 17A.9A and 123.10.

*State or Federal Law Implemented*

This rule making implements, in whole or in part, 2020 Iowa Acts, House File 2389.

*Purpose and Summary*

The proposed amendments revise the Division’s rules regarding uniform waiver and variance procedures. In 2020, the Legislature passed House File 2389, which amends Iowa Code chapter 17A to remove the term “variance” and ensures that agencies’ rules chapters about waiver procedures refer only to “waivers.” The proposed amendments reflect the changes made by House File 2389 and revise the Division’s existing rules for waivers and variances to refer only to waiver of administrative rules.

*Fiscal Impact*

This rule making has no fiscal impact to the State of Iowa.

*Jobs Impact*

After analysis and review of this rule making, no impact on jobs has been found.

*Waivers*

Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Division for a waiver of the discretionary provisions, if any, pursuant to 185—Chapter 19.

*Public Comment*

Any interested person may submit written comments concerning this proposed rule making. Written comments in response to this rule making must be received by the Division no later than 4:30 p.m. on November 24, 2020. Comments should be directed to:

Tyler Ackerson  
Iowa Alcoholic Beverages Division  
1918 SE Hulsizer Road  
Ankeny, Iowa 50021  
Email: ackerson@iowaabd.com

*Public Hearing*

No public hearing is scheduled at this time. As provided in Iowa Code section 17A.4(1)“b,” an oral presentation regarding this rule making may be demanded by 25 interested persons, a governmental subdivision, the Administrative Rules Review Committee, an agency, or an association having 25 or more members.

*Review by Administrative Rules Review Committee*

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its regular monthly meeting or at a special meeting. The Committee's meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

The following rule-making action is proposed:

Amend rule 185—19.1(17A) as follows:

**185—19.1(17A) Scope.** This chapter outlines a uniform process for the granting of waivers ~~or variances~~ from rules adopted by the division. The intent of this chapter is to allow persons to seek exception to the application of rules adopted by the division.

**19.1(1) Definition.** For purposes of this chapter, a “waiver ~~or variance~~” means an action by the division that 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. ~~For simplicity, the term “waiver” shall include both a “waiver” and a “variance.”~~

**19.1(2)** No change.

**ALCOHOLIC BEVERAGES DIVISION[185]**

**Notice of Intended Action**

**Proposing rule making related to administrative actions unit  
and providing an opportunity for public comment**

The Alcoholic Beverages Division hereby proposes to amend Chapter 4, “Liquor Licenses—Beer Permits—Wine Permits,” and Chapter 10, “Contested Cases,” Iowa Administrative Code.

*Legal Authority for Rule Making*

This rule making is proposed under the authority provided in Iowa Code chapter 17A and section 123.10.

*State or Federal Law Implemented*

This rule making implements, in whole or in part, Iowa Code chapters 17A and 123.

*Purpose and Summary*

The proposed amendments update rules related to the policies and procedures of the Division’s Administrative Actions Unit and are intended to increase the effectiveness and efficiency of the Unit. These amendments remove the requirement that a licensee or permittee petition the Division for a waiver in addition to petitioning the Department of Inspections and Appeals for a waiver when the licensee’s or permittee’s business establishment does not meet the bathroom requirements of 481—subrule 31.1(12). These amendments also clarify which entities have authority to file hearing complaints against licensees, permittees, or certificate of compliance holders found to be in violation of applicable laws or rules. These amendments extend the statute of limitations on requesting a contested case from one year to three years. Finally, these amendments clarify the allowable means of filing or delivering certain documents in a contested case. Other nonsubstantive clarifying amendments are also proposed.

*Fiscal Impact*

This rule making has no fiscal impact to the State of Iowa.

*Jobs Impact*

After analysis and review of this rule making, no impact on jobs has been found.

*Waivers*

Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Division for a waiver of the discretionary provisions, if any, pursuant to 185—Chapter 19.

*Public Comment*

Any interested person may submit written comments concerning this proposed rule making. Written comments in response to this rule making must be received by the Division no later than 4:30 p.m. on November 24, 2020. Comments should be directed to:

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No public hearing is scheduled at this time. As provided in Iowa Code section 17A.4(1)“b,” an oral presentation regarding this rule making may be demanded by 25 interested persons, a governmental subdivision, the Administrative Rules Review Committee, an agency, or an association having 25 or more members.

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The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its regular monthly meeting or at a special meeting. The Committee’s meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

The following rule-making actions are proposed:

ITEM 1. Amend rule 185—4.2(123) as follows:

**185—4.2(123) General requirements.** All applicants for ~~liquor control licenses, wine permits, or beer permits~~ certificates of compliance shall comply with the following requirements, where applicable, prior to receiving a liquor license, wine permit, or beer permit certificate of compliance.

**4.2(1) Cleanliness of premises.** The interior and exterior of ~~all the~~ the licensed premises shall be kept clean, free of litter or rubbish, painted and in good repair. Licensees and permittees shall at all times keep and maintain their respective premises in compliance with the laws, orders, ordinances and rules of the state, county and city health and fire departments, and the Iowa department of inspections and appeals.

**4.2(2) Toilet facilities.** All licensees and permittees who mix, serve, or sell alcoholic ~~liquor, wine, or beer~~ beverages for consumption on the licensed premises shall provide for their patrons adequate, conveniently located ~~separate~~ separate indoor or outdoor toilet facilities ~~for men and women, which shall conform to~~ Compliance with county, city, and department of inspections and appeals’ rules and regulations regarding toilet facilities, including any waivers granted by those authorities, shall constitute compliance with this rule. In case of outdoor Outdoor toilet facilities, ~~they~~ shall be approved by the department of inspections and appeals and the local approving authority where the licensed premises is located.

**4.2(3) Water.** All licensed ~~establishments~~ premises shall be equipped with hot and cold running water from a source approved by an authorized health department.

**4.2(4) Financial standing and reputation.** A local authority or the administrator may consider an applicant’s financial standing and good reputation in addition to the other requirements and conditions for obtaining a ~~liquor control license, wine or beer~~ liquor control license, wine or beer permit, or certificate of compliance, and the local authority or the administrator shall disapprove or deny an application for a ~~liquor control license, wine or beer~~ liquor control license, wine or beer permit, or certificate of compliance if the applicant fails to demonstrate that the applicant complies with the lawful requirements and conditions for holding the license, permit, or certificate of compliance.

*a.* In evaluating an applicant’s “financial standing,” the local authority or the administrator may consider such factors as, but not limited to, the following: ~~An applicant’s “financial standing” may include, but is not limited to, verified~~

(1) Verified source(s) of financial support and adequate operating capital for the applicant’s proposed establishment, a,

(2) A record of prompt payment of local or state timely submission of all required federal, state, or local tax returns or forms and prompt payment of all taxes due, a,

(3) A record of prompt payment to the local authority of fees or charges made by a local authority for municipal utilities or other municipal services incurred in conjunction with the proposed establishment, and a.

(4) A record of prompt payment or satisfaction of administrative penalties imposed pursuant to Iowa Code chapter 123.

(5) A record of maintaining, and providing prompt payment for, dramshop liability insurance coverage as required pursuant to Iowa Code chapter 123.

(6) A record of prompt payment for license, permit, or certificate fees.

(7) A record of prompt payment for alcoholic liquor orders placed with the division.

b. In evaluating an applicant's "good reputation," the local authority or the administrator may consider such factors as, but not limited to, the following:

(1) A pattern or practice of sales of alcoholic beverages to 19 and 20 year old persons under the legal age for which the licensee or permittee, or the licensee's or permittee's agents or employees, have pled or have been found guilty,

(2) A pattern and or practice by the licensee or permittee, or the licensee's or permittee's agents or employees, of violating alcoholic beverages laws and regulations for which corrective action has been taken since the previous license or permit was issued, sales,

(3) Sales to intoxicated persons, licensee,

(4) Licensee or permittee convictions for violations of laws relating to operating a motor vehicle while under the influence of drugs or alcohol; and the recency of such convictions under laws relating to operating a motor vehicle while under the influence of drugs or alcohol, licensee,

(5) Licensee or permittee misdemeanor convictions, and the recency of the misdemeanor such convictions,

(6) A pattern or practice by the licensee or permittee, or the licensee's or permittee's agents or employees, of failing to cooperate with the department of public safety, the division, the county attorney, the county sheriff and sheriff's deputies, the city police department, or the city attorney.

(7) A pattern or practice by the licensee or permittee of violating local ordinances established by the local authority pursuant to Iowa Code section 123.39(2).

(8) A pattern or practice by the licensee or permittee of failing to report any change in the ownership or interest of the business pursuant to Iowa Code section 123.39(2) "b"(3).

This rule is intended to implement Iowa Code sections ~~123.3(11), 123.21(11)~~ 123.3(40) and ~~123.30~~ 123.10(11).

ITEM 2. Amend rule 185—10.2(17A) as follows:

**185—10.2(17A) Definitions.** Except where otherwise specifically defined by law:

"Administrator" means the administrator of the alcoholic beverages division of the department of commerce.

"Contested case" means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14 pursuant to Iowa Code section 17A.10A.

"Division" means the alcoholic beverages division of the department of commerce.

"Hearing complaint" means a statement in writing filed by, or on behalf of, the division, a local authority having jurisdiction, or the department of public safety that sets forth the acts or omissions with which the respondent is charged, including the statute(s) and rule(s) which are alleged to have been violated. The hearing complaint shall be in sufficient detail to enable the preparation of the respondent's defense.

"Issuance" means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

"Local authority" means "local authority" as defined in Iowa Code section 123.3(30).

"Party" means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

*“Presiding officer”* means the administrator, the administrator’s designee, or an administrative law judge available under 1998 Iowa Acts, chapter 1202, section 3, and Iowa Code section 123.39(1a) from the department of inspections and appeals.

*“Proposed decision”* means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the administrator did not preside.

ITEM 3. Amend rule 185—10.4(123,17A) as follows:

**185—10.4(123,17A) Statute of limitations.** Requests for a contested case proceeding alleging a violation of Iowa Code chapter 123 must be filed with the division or the local authority within ~~one year~~ three years from the date of the alleged violation or the date of conviction for the violation, whichever is later.

ITEM 4. Amend rule 185—10.5(17A) as follows:

**185—10.5(17A) Requests for a contested case proceeding.**

**10.5(1)** Any person claiming an entitlement to a contested case proceeding shall file a written request within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the agency action in question.

**10.5(2)** The request for a contested case proceeding should state the name and address of the requester, identify the specific agency action which is disputed and, where the requester is represented by a lawyer, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

ITEM 5. Amend subrule 10.6(1) as follows:

**10.6(1) Delivery.** Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- ~~e. First-class mail; or~~
- ~~c.~~ Publication, as provided in the Iowa Rules of Civil Procedure.

ITEM 6. Amend rule 185—10.7(17A) as follows:

**185—10.7(17A) Presiding officer:**

**10.7(1) Administrative law judge.** The administrator may appoint an administrative law judge as presiding officer in all contested case hearings pursuant to ~~1998 Iowa Acts, chapter 1202, section 3, and Iowa Code section 123.39(1a)~~ sections 123.32 and 123.39.

**10.7(2) Appeal.** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the ~~agency~~ administrator. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**10.7(3)** No change.

ITEM 7. Amend subrules 10.10(2) and 10.10(4) as follows:

**10.10(2) Personally investigated.** The term “personally investigated” means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term “personally investigated” does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person’s investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 ~~as amended by 1998 Iowa Acts, chapter 1202, section 19,~~ and subrules 10.10(3) and 10.23(9).

**10.10(4) Motion asserting disqualification.**

*a.* If a party asserts disqualification on any appropriate ground, including those listed in subrule 10.10(1), the party shall file a motion supported by an affidavit pursuant to ~~1998 Iowa Acts, chapter 1202, section 19(7)~~ Iowa Code section 17A.17. The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

*b.* If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

*c.* If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule ~~185—~~10.25(17A) and seek a stay under rule ~~185—~~10.29(17A).

ITEM 8. Amend rule ~~185—~~10.12(17A) as follows:

**185—10.12(17A) Pleadings.**

**10.12(1)** No change.

**10.12(2)** *Petition Hearing complaint.*

*a.* The division, a local authority having jurisdiction, or the department of public safety may give written notice of the cause for action in the form of a hearing complaint and an opportunity for a hearing to a licensee, permittee, or holder of a certificate of compliance for any of the following:

(1) A violation of Iowa Code chapter 123.

(2) A violation of the division's administrative rules.

(3) Failure to comply with an order issued by the division.

(4) Failure to fully cooperate during an investigation, audit, or inspection of the licensee, permittee, or certificate holder, including failure to respond to an inquiry within ten business days of the date of mailing by certified mail, return receipt requested, of a written request for information or records directed to the licensee's, permittee's, or certificate holder's last address on file with the agency.

*b.* A petition hearing complaint shall state in separately numbered paragraphs the following:

~~a-~~ (1) The persons or entities on whose behalf the petition hearing complaint is filed;

~~b-~~ (2) The particular provisions of statutes and rules involved;

~~c-~~ (3) The relief demanded and the facts and law relied upon for such relief; and

~~d-~~ (4) The name, address, and telephone number of the petitioner and the petitioner's attorney, if any.

**10.12(3)** *Answer.*

*a.* An answer shall be filed within 20 days of service of the petition hearing complaint unless otherwise ordered. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

*b.* An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

*c.* An answer shall state the name, address, and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

*d.* Any allegation in the petition hearing complaint not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**10.12(4)** *Amendment.* Any notice of hearing, petition, hearing complaint, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

ITEM 9. Amend rule ~~185—~~10.13(17A) as follows:

**185—10.13(17A) Service and filing of pleadings and other papers.**

**10.13(1)** No change.

**10.13(2) Service—how made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order, so long as there is proof of mailing.

**10.13(3)** No change.

**10.13(4) Filing—when made.** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the division, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing. Parties may file documents with the division by electronic transmission. Filing by electronic transmission is complete upon transmission unless the party making the filing learns that the attempted filing did not reach the division.

**10.13(5) and 10.13(6)** No change.

ITEM 10. Amend paragraph **10.15(1)“a”** as follows:

*a.* Agency subpoenas. An agency subpoena shall be issued to a party on request. Subpoenas may compel the attendance of witnesses at deposition or hearing and the production of books, papers, records, and other real evidence unless they are otherwise expressly exempt from disclosure by Constitution or statute. A command to produce evidence or to permit inspection may be joined with a command to appear at deposition or hearing, or each command may be issued separately. Subpoenas shall be issued by the presiding officer upon a written request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

ITEM 11. Amend subrule 10.16(5) as follows:

**10.16(5) Motions for summary judgment.**

*a.* Motions for summary judgment shall comply with the requirements of Iowa ~~Rule~~ Rules of Civil Procedure ~~237~~ 1.981, 1.982, and 1.983 and shall be subject to disposition according to the requirements of ~~that rule~~ those rules to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

*b.* Motions for summary judgment must be filed and served at least 45 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer.

*c.* A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule ~~185—~~10.28(17A) and appeal pursuant to rule ~~185—~~10.27(17A).

ITEM 12. Amend subrule 10.21(4) as follows:

**10.21(4) Admission and examination.** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should ~~normally~~ be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

ITEM 13. Amend subrule 10.22(6) as follows:

**10.22(6) Good cause defined.** “Good cause” for purposes of this rule shall have the same meaning as “good cause” for setting aside a default judgment under Iowa Rule of Civil Procedure ~~236~~ 1.971.

ITEM 14. Amend subrule 10.29(2) as follows:

**10.29(2) When granted.** In determining whether to grant a stay, the administrator shall consider the following factors listed in ~~1998 Iowa Acts, chapter 1202, section 23(5e):~~

*a.* The extent to which the applicant is likely to prevail when the court finally disposes of the matter.

*b.* The extent to which the applicant will suffer irreparable injury if relief is not granted.

c. The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.

d. The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

ITEM 15. Amend subrule 10.31(2) as follows:

**10.31(2) Issuance of order:**

a. No change.

b. Service. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the agency; or

~~(3) Certified mail to the last address on file with the agency; or~~

~~(4) First class mail to the last address on file with the agency; or~~

~~(5) (3) Fax.~~ Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that agency orders be sent by fax and has provided a fax number for that purpose.

c. No change.

ITEM 16. Adopt the following **new** rule 185—10.32(17A):

**185—10.32(17A) Informal settlement.** A party to a controversy that may culminate or has culminated in contested case proceedings may attempt informal settlement by complying with the procedures set forth in this rule. No party shall be required to settle the controversy or contested case by submitting to informal settlement procedures.

**10.32(1)** Parties desiring informal settlement shall set forth in writing the various points of a proposed settlement, including findings of facts.

**10.32(2)** When signed by the parties and approved by the administrator or the administrator's designee, a settlement shall represent final disposition of the matter.

**10.32(3)** A proposed settlement which is not accepted or signed by the parties and the administrator or the administrator's designee shall not be admitted as evidence in the record of a contested case proceeding. Evidence of conduct or statements made in settlement negotiations likewise are not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

This rule is intended to implement Iowa Code section 17A.10.

ITEM 17. Amend **185—Chapter 10**, implementation sentence, as follows:

These rules are intended to implement Iowa Code chapter 17A ~~as amended by 1998 Iowa Acts, chapter 1202.~~