

NEBRASKA ADMINISTRATIVE CODE

TITLE 223 - DEPARTMENT OF LABOR

CHAPTER 2 - REGULATIONS AND PROCEDURES GOVERNING DECLARATORY ORDERS

001. General Information.

- A. Application of these Model Rules. These regulations are adopted from model rules of procedures promulgated by the Attorney General pursuant to *Neb. Rev. Stat.* §84-909.01, as practicable under the circumstances, and provide for procedures for persons to seek declaratory orders from this agency.
- B. Scope of this Chapter. This chapter pertains solely to the procedures to be used by any person or entity seeking issuance of a declaratory order by this agency.
- C. Related Regulations. In addition to this chapter, related regulations pertaining to administrative procedures before agencies are: 223 NAC 1, relating to appeals of unemployment insurance tax issues; 223 NAC 3, governing petitioning for rulemaking; 223 NAC 4, relating to procedures for negotiated rulemaking; 223 NAC 5, regarding rules of practice and procedure for hearings in contested cases; and 224 NAC 1, relating to appeals of unemployment insurance benefit appeals.

002. Definitions. As used in this chapter:

- A. Agency or Department shall mean the Department of Labor.
- B. Commissioner shall mean the Commissioner of Labor of the Nebraska Department of Labor.
- C. Argument shall mean the oral statement of the petitioner or any other party which explains his or her view of the facts and issue to be decided, the law applicable to the question presented, and the reasoning that connects the facts and law.
- D. Contested case shall mean a proceeding before the agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after hearing before the agency.
- E. Declaratory order proceeding shall mean a proceeding initiated by a petitioner seeking issuance of a binding order by the agency as to the applicability of specified circumstances to a statute, rule, regulation, or order within the primary jurisdiction of the agency.

- F. Hearing officer shall mean the person or persons conducting a declaratory order proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title.
- G. Intervenor(s) shall mean persons, political subdivisions, corporations, organizations, or other entities who have or claim to have any interest, legal right, duty, privilege, or immunity, which would be directly affected by the agency's issuance of a binding declaratory order.
- H. Necessary party shall mean a person who or an entity which has a specific interest in the applicability of the statute, rule, regulation, or order, as distinguished from a general interest such as may be the concern of the public at large. A necessary party is one which is or would be adversely affected in a legally cognizable way by the uncertainty sought to be resolved.
- I. Parties shall mean persons, political subdivisions, corporations, organizations, or other entities subject to the jurisdiction of the agency who are involved in a declaratory order proceeding according to the procedures set forth in this chapter.
- J. Petition shall mean the document filed in accordance with section 003 of this chapter to initiate a declaratory order proceeding.
- K. Petitioner(s) shall mean a party or parties who have filed a petition with the agency seeking issuance of a declaratory order.
- L. Pleading shall mean any written petition, answer, or motion used in any declaratory order proceeding before the agency as set forth in this chapter.

003. Petition for Declaratory Order.

- A. Generally. A request for a declaratory order must be made by a petition that meets the requirements of section 003.
- B. Who May File. Any person may petition the agency for issuance of a declaratory order as to the applicability to specified circumstances of a statute, rule, regulation, or order which is within the primary jurisdiction of the agency, except matters relating to unemployment benefit eligibility or liability for the payment of combined taxes.
- C. When Orders Appropriate. A declaratory order may be requested on the applicability of a statute, rule, regulation, or order enforced by the agency, except matters relating to unemployment benefit eligibility or liability for the payment of combined taxes. "Applicability" refers to the appropriateness of the relation of the law to the person, property, or state of facts, or its relevance under the circumstances given. It may include such questions as whether the law applies at all, to whom it applies, when it applies, how it applies, or which law applies. Considerations as to whether issuance of a declaratory order is appropriate include:

1. A declaratory order may be requested only on the applicability of existing statutes and rules and regulations.
 2. A declaratory order may be requested to obtain a determination of proposed conduct, not to obtain a determination of the effect of conduct that has already occurred.
 3. A declaratory order is not a mechanism for review or appeal of a decision made by the agency in a contested case.
 4. A declaratory order may not be requested to obtain a declaration by the agency that a statute or regulation is unconstitutional or that a regulation of the agency is invalid.
 5. A declaratory order may not be issued by the agency that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.
- D. Form of Petition. A petition for declaratory order shall be in the form of either a pleading or letter which shall contain each of the following:
1. A caption, which shall include:
 - a. The venue: BEFORE THE NEBRASKA WORKFORCE DEVELOPMENT, DEPARTMENT OF LABOR;
 - b. A heading specifying the subject matter and the name of the petitioner; and
 - c. The name of the pleading: PETITION FOR DECLARATORY ORDER.
 2. The statements required in subsection 003(E) of this chapter.
 3. The signature of the petitioner, or when represented by an attorney, the signature of the attorney.
 4. The name and address of the petitioner, and when represented by an attorney, the name, address, telephone number, and bar number of the attorney.
 5. Size and Paper. The petition shall be made on white, letter-sized (8-1/2" x 11") paper.
 6. Print. The petition shall be legibly typewritten, photostatically reproduced, printed, or handwritten. If handwritten, the petition must be written in ink. Only one side of a page shall contain any writing.
 7. Attachments. Any documents attached to a petition shall be securely fastened to the pleading and shall meet the requirements of 003(D)(5) and 003(D)(6) and,

when possible, be reproduced on 8-1/2" x 11" paper or placed in an 8-1/2" x 11" envelope and clearly marked as an attachment to the petition.

- E. Contents of Petition. To be considered, the petition shall include the following:
1. The name and address of the petitioner;
 2. The name and address of all persons or entities, known to the petitioner, who may have a specific interest in the applicability of the statute, rule, regulation, or order or who may be adversely affected by the issue sought to be resolved by the petitioner.
 3. The statute, rule, regulation, or order upon which the petitioner seeks issuance of a declaratory order;
 4. A detailed statement of all of the material facts and specific circumstances which apply to petitioner's request for issuance of a declaratory order;
 5. All propositions of law or contentions asserted by the petitioner;
 6. A demand for the relief to which the petitioner alleges entitlement. The petition shall state the petitioner's position as to how the agency should rule and why the agency should rule in the manner requested; and
 7. Any documents pertinent to the petition that the petitioner wishes to be considered by the agency.
- F. The petition shall be subscribed and verified by the petitioner. If the petitioner is a corporation, political subdivision, or other entity, then the petition shall be subscribed and verified by a duly authorized agent of the petitioning entity.
- G. Sample Petition. The petitioner may use the sample form of a petition which is attached as "Appendix A" and incorporated within this chapter. The petitioner may also prepare a reasonable facsimile of "Appendix A" so long as the requirements of subsections 003(D), 003(E) and 003(F) of this chapter are satisfied.
- H. Written Consents. The petitioner shall also attach to the petition any written consents obtained from any necessary party that the petition may be determined by use of a declaratory order proceeding.

004. Submission and Service of Declaratory Order Petition.

- A. The original petition for declaratory order shall be filed with the Commissioner by mail or in person during the agency's normal business hours, Monday through Friday, 8:00 a.m. to 5:00 p.m., Central Time, exclusive of weekends and state or federal holidays. When a filing or submission date falls on a weekend or legal holiday, the date for such filing or submission shall be the next business day. Filings shall be directed to: Commissioner of Labor, 550 South 16th Street, P.O. Box 94600, Lincoln, NE 68509-4600.

- B. The petition shall be deemed as filed when it is actually received by the agency. The agency shall date stamp all petitions upon receipt.
- C. At the same time the petition is filed with the agency, the petitioner shall serve a copy of the petition, by certified mail, return receipt requested, on all necessary parties, including all persons, political subdivisions, corporations, organizations, or other entities who are known to have or claim any interest, legal right, duty, privilege, or immunity which would be directly affected by issuance of a declaratory order in this matter by the agency.

005. Disposition of the Petition.

- A. Generally. Upon the filing of a petition, the Commissioner may consider the petition, refer the petition to an appropriate licensing or governing board, or delegate the matter to a designated hearing officer, board, or agency employee to consider the petition and recommend a decision to the Commissioner. In reviewing the petition, the agency may, in its discretion, do one or more of the following:
 - 1. Require that additional information be submitted before the petition will be further considered;
 - 2. Require a petitioner to provide notice to persons or entities who may be necessary parties and other persons that a request for a declaratory order has been filed with the agency;
 - 3. Schedule a date, time, and location at which the petitioner and any other parties to the proceeding may make an oral presentation on the petition;
 - 4. Consider the petition and any attachments without oral presentation.
- B. Within thirty (30) days after the petition is filed, the agency shall, in writing:
 - 1. Issue an order declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances; or
 - 2. Agree to issue an order by a specified time declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances; or
 - 3. Set the matter for specified proceedings as set forth in subsection 005(A) of this chapter; or
 - 4. Decline to issue a declaratory ruling, stating the reasons for the agency's decision.
- C. Notwithstanding section 005(B) of this rule, the agency may determine at any time that it will not issue a declaratory order if issuance of an order under the circumstances would be contrary to any provisions of section 009 of this chapter. The agency shall notify the petitioner and, if applicable, any intervenor or necessary party in writing when the agency determines not to issue a declaratory order.

006. Intervention in Declaratory Order Proceeding.

- A. Intervention by any person or entity in a declaratory order proceeding shall be allowed when the following requirements are met:
1. A petition for intervention must be submitted in writing to the agency. Copies must be mailed to all parties to the proceeding.
 2. The contents of the petition must be as specified in 006(B).
 3. The agency must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.
- B. Contents of Petition. The petition for intervention shall be submitted to the agency, in writing, on 8 ½" x 11" white paper, and shall include each of the following:
1. The statute, regulation, rule, or order that may apply to or affect the person, property, entity, or facts at issue in the matter;
 2. A statement of facts sufficient to show the intervenor's interest;
 3. A statement of facts which demonstrate that the intervenor's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the intervenor may intervene pursuant to a provision of law;
 4. All propositions of law or contentions asserted by the intervenor; and
 5. A statement of the specific relief requested by the intervenor.
- C. The agency may, at its discretion, invite any person or entity to file a petition for intervention.
- D. The agency shall grant a petition for intervention if the requirements of section 006(A) and section 006(B) are satisfied.
- E. The agency shall deny a petition for intervention upon determining that the interests of justice or the orderly and prompt conduct of the proceedings would be impaired by allowing the intervention.
- F. The agency's decision to grant or deny a petition for intervention shall be in writing and served upon all parties.

007. Declaratory Order Proceedings.

- A. Oral Argument, When. Oral argument shall be had only on specific order of the agency. A petitioner, intervenor, necessary party, or the agency may submit a motion for oral

argument to the Commissioner. If opportunity for oral argument is granted, then argument shall be scheduled to be conducted not more than forty-five (45) days after filing of the petition. Petitioner and all other parties or, when represented, their attorneys, shall be served by the agency with a notice of the date, time, and location for oral argument. The agency shall provide each of the parties with notice of the proceeding not less than seven (7) days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested.

- B. Oral Argument, Procedure. Oral argument will be made before a hearing officer or before any representative of the agency who is authorized to render or to recommend a decision to the agency. The hearing officer or agency representative shall be in control of the proceeding and shall:
 - 1. Identify the proceeding and introduce himself or herself and identify each party for the record;
 - 2. Hear the oral argument of the petitioner, intervenor, or necessary parties;
 - 3. Close the proceedings.
- C. At the declaratory order proceeding, agency staff shall have the right to present oral argument.
- D. The hearing officer or representative may impose reasonable time limits on the amount of time allocated to each party for oral argument.
- E. The parties and agency staff may file briefs in support of their respective positions. The hearing officer may fix the time and order of filing briefs and may direct that briefs be submitted prior to the date of oral argument.
- F. The oral argument may be conducted either in person or by telephone conference call.

008. Issuance of Declaratory Order.

- A. The agency shall issue its declaratory order within sixty (60) days of the date on which the petition was filed.
- B. The declaratory order shall be in writing and shall include the following:
 - 1. The names of all parties to the proceeding upon which the order is based;
 - 2. The facts upon which the order is based;
 - 3. The statute, regulation, rule, or order at issue in the matter;
 - 4. The agency's conclusion as to the applicability of the statute, regulation, rule, or order to the facts;

5. The agency's conclusion as to the legal effect or result of applying the statute, regulation, rule, or order to the facts; and reasons relied upon by the agency to support its conclusions.
- C. A copy of the declaratory order shall be served upon each party by certified mail, return receipt requested.
- D. Effect of Declaratory Order. A declaratory order shall have the same status and binding effect as any other order issued in a contested case.
- E. No Response within 60 Days. If the agency has not issued a declaratory order within sixty (60) days after the petition has been filed, then the petition shall be deemed to have been denied by the agency.

009. Circumstances Under Which Agency will not Issue Declaratory Orders.

- A. Grounds upon which the agency shall refuse to issue a declaratory order include, but are not limited to, the following:
 1. The petition requests a declaratory order on a matter that is outside the scope of authority of the agency;
 2. The petition requests review or appeal of a decision made by the agency in a contested case;
 3. The petition requests a declaratory order on the effect of past conduct;
 4. An investigation for purposes of a formal adjudication, a contested case, or a petition to issue, amend, or repeal regulations is pending before the agency involving the petitioner on substantially the same or similar facts or issues raised in the petition;
 5. The petition seeks a declaration that a statute or rule or regulation is unconstitutional or invalid;
 6. The issue raised in the petition has been settled by a change in circumstances or other means so as to render moot the need for a declaratory order;
 7. An order would substantially prejudice the rights of a person or entity who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding;
 8. An order would not resolve the controversy or uncertainty; or
 9. The question posed or facts presented are insufficiently specific, overly broad, or are otherwise inappropriate as a basis upon which to decide the matter.
 10. The question posed relates to eligibility for unemployment benefits or liability for combined tax.

- B. Grounds upon which the agency may determine to refuse to issue a declaratory order include, but are not limited to, the following:
1. Refusal is necessary to assure adequate allocation of agency resources are available for issuing rulings on petitions raising questions of greater urgency or significance;
 2. The question presented is of such complexity that the agency has had insufficient opportunity or resources to develop a fully matured ruling;
 3. The petitioner fails to submit any additional information requested by the agency or submits such information after the date established by the agency;

010. Appeal.

A declaratory order is subject to review in the manner provided for review of contested cases by the Administrative Procedure Act, *Neb. Rev. Stat.* §§84-901 to 84-920. Specific procedures for appeal are set forth in *Neb. Rev. Stat.* §84-917 which provides that parties desiring to appeal an agency decision must file a petition for review in the district court of the county where the agency action is taken within thirty days after the service of the final decision by the agency. The thirty day period for appeal commences to run from the date of mailing of the notice of order and decision to the parties or their attorneys of record. Service of the petition and summons must be made in accordance with Nebraska law.

Appendix "A"

BEFORE THE NEBRASKA WORKFORCE DEVELOPMENT,
DEPARTMENT OF LABOR

In the matter of the)
application of [name]) PETITION FOR DECLARATORY ORDER

1. Petitioner's name and address;
2. The name and address of all persons who or entities which may have a specific interest in the applicability of the statute, rule, regulation, or order, or who may be adversely affected by the issue sought to be resolved;
3. All material facts and specific circumstances;
4. All rules of law which apply;
5. Petitioner's demand for relief;

DATED [date] .

[Petitioner's signature]

STATE OF)
) ss. VERIFICATION
COUNTY OF [county])

[Name], being first duly sworn, states that he/she is the petitioner/petitioner's agent in the above entitled matter; that he/she has read the foregoing Petition For Declaratory Order; and that the allegations of fact therein are true.

[Petitioner's signature]

SUBSCRIBED and sworn to before me on [date] .

Notary Public

(SEAL)