

# SENATE BILL REPORT

## ESHB 2747

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As of February 19, 1996

**Title:** An act relating to regulatory reform.

**Brief Description:** Implementing regulatory reform.

**Sponsors:** House Committee on Government Operations (originally sponsored by Representatives Mastin, Reams, Silver and Johnson).

**Brief History:**

**Committee Activity:** Government Operations: 2/22/96.

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### SENATE COMMITTEE ON GOVERNMENT OPERATIONS

**Staff:** Jonathan Seib (786-7427)

**Background:** During the 1994 and 1995 sessions, the Legislature passed legislation that made substantial changes to the state agency rulemaking process and the legislative review of rules. The changes included a Regulatory Fairness Act and state agency technical assistance. The Governor vetoed a number of sections contained in this legislation.

**Rule Adoption:** ESHB 1010 as passed by the Legislature during the 1995 session prohibited the departments of Labor and Industries, Revenue, Ecology, Social and Health Services, Health, Licensing, Employment Security, and Agriculture, the Fish and Wildlife Commission, the Forest Practices Board, the Commissioner of Public Lands, and the Insurance Commissioner from relying solely upon the agency's enabling provisions and/or statement of intent as statutory authority to adopt a rule.

All other agencies were prohibited from adopting rules based solely on enabling provisions and/or statements of intent when implementing future statutes, except to interpret ambiguities in a statute. The Governor vetoed the sections pertaining to the Forest Practices Board, the Department of Labor and Industries, and the Insurance Commissioner.

When adopting significant legislative rules, the departments of Labor and Industries, Revenue, Ecology, Health, Employment Security, and Natural Resources, and the Forest Practices Board must make certain determinations and place sufficient documentation into the rulemaking file. These determinations include whether the probable benefits exceed the probable costs, whether the rule conflicts with federal or state law, and other determinations. A rule-implementation plan must be filed before adopting a significant legislative rule. The Joint Administrative Rules Review Committee (JARRC) may also require that a state agency rule be subject to these determinations. Certain rules, including emergency rules, procedural rules, rules adopting federal or state laws by reference, and other types of rules are exempt from this determination process.

Any person may petition an agency for adoption of an amendment or repeal of a rule. If an agency denies, the person may appeal to the Governor. The Governor has several alternatives, including directing certain agencies to commence rulemaking or recommending to other certain agencies that they adopt, amend, or repeal the rule in question.

Challenges to Agency Actions: The burden of proof for demonstrating the validity of an agency action, including the validity of a rule, is on the person asserting its invalidity. Rule challenges must be commenced in court within two years of the rule's effective date.

A court is required to award fees and other expenses, including reasonable attorneys' fees, to a qualified party who prevails against a state agency in a challenge of an agency action unless the court finds that the agency action was substantially justified or that circumstances would make an award unjust. The amount awarded may not exceed \$25,000. The court may reduce the award to the extent that a qualified party unduly or unreasonably protracted the final resolution of the matter. The law does not address the awarding of fees and other expenses if the agency appeals the superior court decision.

**Summary of Bill:** Rule Adoption: The Forest Practices Board, the Department of Labor and Industries, and the Insurance Commissioner are prohibited from relying solely on a statement of intent and/or the agency's enabling provisions as statutory authority for adopting a rule. A similar limitation for those three agencies plus nine others is made retroactive back to the effective date of SHB 1010, which was July 23, 1995.

The Insurance Commissioner may use enabling/intent provisions to adopt procedural or interpretive rules. The Insurance Commissioner's authority for making new rules about unfair methods of competition and unfair acts and practices is eliminated. The previously adopted rules on these subjects are retained, if otherwise valid, until repealed by the commissioner or through the enactment of new laws.

A prohibition limits the Department of Labor and Industries from relying on enabling/intent provisions as statutory authority for adopting rules after the effective date of this section, but does not apply to rules pertaining to prevailing wage.

DSHS is added to the list of agencies that must comply with the significant legislative rule process. Clarification is added that it is the "substance" of the rule that is coordinated with other governmental units.

Exemption from the significant legislative rule determination process when adopting other state agency rules by reference is removed if the state agency rule to be adopted by reference has not been so processed. The agency must then comply with significant legislative rule procedures. When an existing significant legislative rule subsection is amended, the total section must be submitted to the determination process.

Requirements are specified for the agency rulemaking file and provides that, unless specified in law, the file need not be the exclusive basis for an agency's rule action or the judicial review thereof.

Rule Readoption: Any person can petition an agency for readoption of an existing rule. Within 60 days the agency must either deny, giving reasons and alternative means to address

concerns, or commence rule readoption. After an agency denial, JARRC can be asked to direct the agency to initiate readoption. An automatic repealer occurs in six months when an agency fails to follow JARRC's readoption decision.

Administrative Hearings: An administrative law judge is required for hearings under the insurance code, unless the person demanding the hearing agrees in writing to have an employee of the commissioner conduct the hearing.

Judicial Review: The burden of proof is on state agency to show the validity of a challenged rule or to demonstrate that an agency order did not violate the challenged provisions of law.

The time period to challenge a rule's validity in court for not being adopted in substantial compliance with the rulemaking criteria in RCW 34.05.310-395 is seven years after the rule's effective date. Venue is specified for enjoining the application of a rule by a local government in certain situations under the law.

After the year 2000, certain agencies cannot rely solely on a statute's intent or enabling provisions or a combination as authority for having adopted a rule challenged after the year 2000.

Attorneys' fees and expenses in rule validity cases for a qualified party are limited to the maximum amounts awardable: superior court, \$25,000; court of appeal and the Supreme Court, \$15,000. For other "agency action" cases, the maximum amount awardable in superior court is \$50,000; in courts of appeal and the Supreme Court, \$15,000. These awards do apply to cases pending on the effective date of the 1995 Regulatory Reform law (July 23, 1995).

JARRC's authority to require small business economic impact statements and compliance with the significant legislative rule process on proposed rules is described. The possible content of the JARRC notice to agencies under certain situation in which the agency is acting beyond legislative intent is also described.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.