

SENATE BILL REPORT

SB 5132

As of February 13, 1995

Title: An act relating to regulatory reform.

Brief Description: Implementing regulatory reform.

Sponsors: Senators Hale, A. Anderson, Deccio, Wood, Cantu, Schow, Finkbeiner, Johnson, McCaslin, Long, Prince, Moyer, Hochstatter, West, McDonald and Oke.

Brief History:

Committee Activity: Government Operations: 2/15/95, 2/16/95.

SENATE COMMITTEE ON GOVERNMENT OPERATIONS

Staff: Jonathan Seib (786-7427)

Background: In 1994, the Legislature passed a bill that made changes to the state agency rulemaking process. The Governor, who had initiated a task force on regulatory reform in September 1993, vetoed numerous sections of the bill. In June, the Governor issued an executive order incorporating some of the vetoed sections. The Governor's task force issued its final report in December.

Grants of Rulemaking Authority: The enabling statutes of many state agencies grant those agencies general authority to adopt rules. Typically, the language authorizes rules "necessary or appropriate to carry out the provisions of this act," or "necessary or desirable to carry out the powers and duties imposed by the Legislature." There is concern that agencies have used these general grants of authority to regulate in ways that the Legislature did not intend.

Rulemaking Requirements: The state Administrative Procedure Act (APA) sets forth the process that agencies must follow when adopting rules. It requires an agency to first prepare a "statement of intent" and solicit comments on a subject of possible rulemaking. The agency must hold a hearing on a proposed rule, after notice of the hearing is given in the State Register. The agency is required to consider, summarize, and respond to the comments it receives. The agency may then withdraw the rule, modify it, or adopt it as proposed.

An agency must maintain a public rulemaking file for each proposed rule. The file must include various documents relevant to the adoption of the rule. However, the APA explicitly states that the rulemaking file need not be the exclusive basis for agency action on a rule.

A court may invalidate an agency rule if, among other things, it determines that the rule "could not conceivably have been the product of a rational decision maker." The state Supreme Court has interpreted this language to be analogous to the more familiar "arbitrary and capricious" standard.

Any person may petition a state agency to adopt, amend, or repeal a rule. Within 60 days, the agency is required to either deny the petition and state the reasons for the denial, or initiate rulemaking proceedings.

Regulatory Fairness: The Regulatory Fairness Act was adopted in 1982 to promote agency consideration and mitigation of the impact their rules have on small business.

The act requires that in the adoption of a rule which will have an economic impact on more than 20 percent of all industries, or more than 10 percent of any one industry, the agency must prepare a small business economic impact statement. If it is legal and feasible, the agency is also to reduce the economic impact of the rule in ways specified in the act.

Legislative Review of Rules: The Joint Administrative Rules Review Committee (JARRC) is an eight-member bipartisan legislative committee established to selectively review proposed and existing rules. In certain circumstances, JARRC is authorized to recommend to the Governor the suspension of an agency rule. If the Governor approves the suspension, the suspension is effective until 90 days after the end of the next regular legislative session. A JARRC suspension recommendation does not establish a presumption as to the legality of the rule in subsequent judicial proceedings.

Technical Assistance: The Department of Labor and Industries operates a voluntary compliance program that provides on-site or other types of consultations to employers regarding their compliance with health and safety standards. These visits are not regarded as inspections, nor is any enforcement action taken unless a serious violation is found and the violation is not or cannot be satisfactorily abated by the employer.

The Department of Ecology operates a similar program that provides on-site consultation to businesses to help them comply with environmental regulations. The technical assistance officer may report violations to enforcement personnel within the department, but may not take enforcement action unless persons or property are at risk of substantial harm.

Fees and Expenses: As a general rule in this state, a party seeking review of, or defending against, a state agency action is responsible for his or her own attorney's fees and expenses. However, under federal law, with some limitations, the prevailing party in any civil action brought by or against the United States may be awarded costs and attorneys' fees.

Summary of Bill: Grants of Rulemaking Authority: The general rulemaking authority of certain agencies is removed. These agencies are authorized to adopt non-emergency rules only as specifically required by federal law or as specifically authorized by the Legislature. The agencies affected include the Departments of Health, Revenue, Labor and Industries, Licensing, Employment Security, Fish and Wildlife, the Forest Practices Board, and the Office of Insurance Commissioner. Courts are directed to narrowly construe grants of rulemaking authority to all state agencies.

Rulemaking Requirements: An agency "statement of intent" must identify other agencies that have rulemaking authority over the subject matter or activity of a new rule and describe the process for coordination with those agencies.

The rulemaking file must contain substantial evidence that a rule is: authorized; necessary; cost-effective; consistent with and not duplicated by other federal, state, or local laws; enforceable; targeted; measurable; the least burdensome alternative; and not in excess of federal law unless authorized by state statute.

The rulemaking file is made the exclusive basis for agency action on a rule. The current "conceivably the product of a rational decision maker" language is changed to "arbitrary and capricious."

Upon the adoption of a rule, agencies are required to take certain actions to identify other laws regulating the same activity or subject matter, and then coordinate implementation and enforcement of the rule with these other laws.

Rules adopted by the following agencies are given a maximum life span of seven years: the Departments of Health, Revenue, Ecology, Labor and Industries, Licensing, Employment Security, Fish and Wildlife, and the Office of Insurance Commissioner. These agencies are required to review their existing rules on a schedule over the next seven years.

The existing process for petitioning for the repeal or amendment of a rule is amended to allow the petitioner, if their petition is denied by an agency under the Governor's authority, to appeal the denial to the Governor. The Governor must consider certain listed factors in deciding whether to approve or reject the appeal.

Regulatory Fairness: The language is changed as to when an agency must prepare a Small Business Economic Impact Statement (SBEIS). An SBEIS is required to be prepared whenever a rule will impose more than minor costs on businesses in an industry. "More than minor costs" is defined as equal to or exceeding 0.1 percent of the average yearly profit for businesses in the industry.

Based on the extent of disproportionate impact identified in the SBEIS, agencies are required to reduce the costs imposed by rules on small businesses unless reasonable justification exists to do otherwise.

Legislative Review of Rules: Several changes are made to the law governing the Joint Administrative Rules Review Committee, including: (1) changing its name to the "Legislative Regulatory Oversight Committee" (LROC); (2) requiring an agency to file with the committee three copies of the evidence supporting a rule, along with the proposed rule; (3) authorizing the committee to act based on a majority vote of a quorum of its members (a quorum is defined as five members); (4) providing for initial review of proposed rules by the legislative standing committees prior to the review by the LROC; (5) authorizing the public and state employees to petition LROC to review a rule; (6) providing that a committee recommendation to suspend a rule creates a presumption in judicial proceedings that the rule is invalid; (7) authorizing the committee to appoint ad hoc advisory committees and hire staff; and (8) giving the committee subpoena power. Also included are provisions which amend the state "whistleblower" statute to cover state employees providing information to the LROC.

Technical Assistance: Certain agencies are allowed to impose immediate penalties only on those who have willfully violated a rule, or violated a rule causing significant harm. Where

other than these types of violations occur, these agencies are to issue a statement of deficiency that suggests methods for achieving compliance and identifies agency technical assistance personnel, and negotiate a date for a revisit. At the revisit, compliance is reassessed and, if necessary, a new date for compliance is established. The agency may assess a penalty only if there is no compliance by the third visit. The agencies affected include the Departments of Health, Labor and Industries, Ecology, Revenue, Licensing, Employment Security, Fish and Wildlife, and the Insurance Commissioner.

Agencies who are enforcing federally delegated laws or regulations are required to submit a written petition to the appropriate federal agency for authorization to comply with these requirements. If federal approval is not granted, the agency only complies with these requirements once the minimum number of inspections necessary to retain federal enforcement delegation has been achieved.

Enforcement personnel in the Department of Health, the Department of Revenue, the Department of Ecology, the Department of Labor and Industries, the Department of Licensing, the Department of Employment Security, the Department of Social and Health Services, the Department of Fish and Wildlife, the Department of Natural Resources, and the Office of Insurance Commissioner are converted to technical assistance personnel. However, this requirement does not apply where enforcement personnel are required to maintain the state's authority to administer a federally delegated program.

Fees and Expenses: A qualified party who succeeds in having a rule invalidated in court is entitled to attorney's fees and costs not to exceed \$10,000. The fees are available to individuals or businesses with less than a certain net worth or with fewer than 100 employees. Any nonprofit corporation or agricultural marketing association is also eligible. The parties are paid by the agency whose rule was declared invalid.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains a referendum clause and takes effect 30 days after the next general election, if it is approved (December 7, 1995).