

SENATE BILL NO. 148

INTRODUCED BY J. SHOCKLEY

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THAT A SMALL BUSINESS IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS BE CONDUCTED PRIOR TO THE ADOPTION OF AN ADMINISTRATIVE RULE; DEFINING "SMALL BUSINESS"; REQUIRING THAT SMALL BUSINESS IMPACT STATEMENTS AND REGULATORY FLEXIBILITY ANALYSES BE MADE AVAILABLE TO THE PUBLIC; REQUIRING LEGISLATIVE INTERIM COMMITTEES TO CONSIDER SMALL BUSINESS IMPACT STATEMENTS AND REGULATORY FLEXIBILITY ANALYSES WHEN REVIEWING ADMINISTRATIVE RULES; REVISING CERTAIN PROCESSES FOR JUDICIAL REVIEW OF ADMINISTRATIVE RULES; AND AMENDING SECTIONS 2-4-102, 2-4-103, 2-4-110, 2-4-314, 2-4-406, AND 2-4-506, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Small business impact statement. (1) Prior to the adoption of a proposed rule, the agency promulgating the rule shall determine if the rule will impact small businesses. If the agency determines that the proposed rule will not impact small businesses, the determination must be published in the register when the proposed rule is published. If the agency determines that the proposed rule may have an adverse impact on small businesses, the agency shall prepare a small business impact statement that includes, at a minimum, the following:

- (a) an identification and estimate of the number of small businesses subject to the proposed rule;
- (b) the estimated reporting, recordkeeping, and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary to prepare the report or record;
- (c) a statement of the probable effects of the proposed rule on impacted small businesses; and
- (d) a description of any alternative methods that may be less intrusive or less costly to small businesses for achieving the purpose of the proposed rule.

(2) The agency shall provide documentation for the estimates, statements, and descriptions required under subsection (1).

NEW SECTION. Section 2. Regulatory flexibility analysis. Prior to adopting a proposed rule, an

1 agency shall prepare a regulatory flexibility analysis. When preparing the regulatory flexibility analysis, the
2 agency shall, when consistent with public health, safety, and environmental and economic welfare, consider using
3 regulatory methods that will accomplish the objectives of the law being implemented while minimizing adverse
4 impacts on small businesses. To reduce the negative impacts of the proposed rule on small businesses, the
5 agency shall consider:

6 (1) establishing less stringent compliance or reporting requirements for small businesses than for other
7 businesses;

8 (2) establishing less stringent schedules or deadlines for compliance or reporting requirements for small
9 businesses than for other businesses;

10 (3) consolidating or simplifying compliance or reporting requirements for small businesses;

11 (4) establishing performance standards for small businesses to replace design or operational standards
12 required in the proposed rule for other businesses; and

13 (5) exempting small businesses from all or any part of the requirements contained in the proposed rule.
14

15 **NEW SECTION. Section 3. Notification -- small business impact statement and regulatory**
16 **flexibility analysis -- assistance.** (1) Subsequent to completing the small business impact statement and the
17 regulatory flexibility analysis required in [sections 1 and 2] and prior to adopting a proposed rule that the agency
18 has concluded may have an adverse impact on small businesses, the agency shall notify the appropriate
19 administrative rule review committee of the agency's intent to adopt the proposed rule and provide to the
20 committee a copy of the small business impact statement required in [section 1] and the regulatory flexibility
21 analysis required in [section 2].

22 (2) The office of economic development, established in 2-15-218, shall advise and assist agencies in
23 complying with the provisions of [sections 1 and 2] and this section.
24

25 **Section 4.** Section 2-4-102, MCA, is amended to read:

26 **"2-4-102. Definitions.** For purposes of this chapter, the following definitions apply:

27 (1) "Administrative rule review committee" or "committee" means the appropriate committee assigned
28 subject matter jurisdiction in Title 5, chapter 5, part 2.

29 (2) (a) "Agency" means an agency, as defined in 2-3-102, of the state government, except that the
30 provisions of this chapter do not apply to the following:

(i) the state board of pardons and parole, except that the board is subject to the requirements of 2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the ARM and the register;

(ii) the supervision and administration of a penal institution with regard to the institutional supervision, custody, control, care, or treatment of youths or prisoners;

(iii) the board of regents and the Montana university system;

(iv) the financing, construction, and maintenance of public works;

(v) the public service commission when conducting arbitration proceedings pursuant to 47 U.S.C. 252 and 69-3-837.

(b) Agency does not include a school district, unit of local government, or any other political subdivision of the state.

(3) "ARM" means the Administrative Rules of Montana.

(4) "Contested case" means a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to ratemaking, price fixing, and licensing.

(5) (a) "Interested person" means a person who has expressed to the agency an interest concerning agency actions under this chapter and has requested to be placed on the agency's list of interested persons as to matters of which the person desires to be given notice.

(b) The term does not extend to contested cases.

(6) "License" includes the whole or part of an agency permit, certificate, approval, registration, charter, or other form of permission required by law but does not include a license required solely for revenue purposes.

(7) "Licensing" includes an agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

(8) "Party" means a person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party, but this chapter may not be construed to prevent an agency from admitting any person as a party for limited purposes.

(9) "Person" means an individual, partnership, corporation, association, governmental subdivision, agency, or public organization of any character.

(10) "Register" means the Montana Administrative Register.

(11) (a) "Rule" means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice

requirements of an agency. The term includes the amendment or repeal of a prior rule.

(b) The term does not include:

(i) statements concerning only the internal management of an agency or state government and not affecting private rights or procedures available to the public, including rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide budgeting and accounting system;

(ii) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;

(iii) rules relating to the use of public works, facilities, streets, and highways when the substance of the rules is indicated to the public by means of signs or signals;

(iv) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when there is a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules is indicated to the public by means of signs or signals; or

(v) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in accordance with 2-4-306 and must be published in the ARM.

(12) (a) "Significant interest to the public" means agency actions under this chapter regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial fiscal impact to or controversy involving a particular class or group of individuals.

(b) The term does not extend to contested cases.

(13) "Small business" means a business entity, including its affiliates, that is independently owned and operated and that employs fewer than 20 full-time employees.

~~(13)~~(14) "Substantive rules" are either:

(a) legislative rules, which if adopted in accordance with this chapter and under expressly delegated authority to promulgate rules to implement a statute have the force of law and when not so adopted are invalid; or

(b) adjective or interpretive rules, which may be adopted in accordance with this chapter and under express or implied authority to codify an interpretation of a statute. The interpretation lacks the force of law."

Section 5. Section 2-4-103, MCA, is amended to read:

"2-4-103. Rules and statements information to be made available to public. (1) Each agency shall:

(a) make available for public inspection all rules and all small business impact statements, regulatory

1 flexibility analyses, and other written statements of policy or interpretations formulated, adopted, or used by the
2 agency in the discharge of its functions;

3 (b) upon request of any person, provide a copy of any rule.

4 (2) Unless otherwise provided by statute, an agency may require the payment of the cost of providing
5 ~~such~~ copies.

6 (3) ~~No~~ An agency rule is not valid or effective against any person or party whose rights have been
7 substantially prejudiced by an agency's failure to comply with the public inspection requirement ~~herein~~ provided
8 for in this section."

9
10 **Section 6.** Section 2-4-110, MCA, is amended to read:

11 **"2-4-110. Departmental review of rule notices, small business impact statements, and regulatory**
12 **flexibility analyses.** (1) The head of each department of the executive branch shall appoint an ~~existing~~
13 paralegal, or other qualified person from that department to review each departmental rule proposal notice,
14 adoption notice, or other notice, each small business impact statement, and each regulatory flexibility analysis
15 relating to administrative rulemaking. Notice of the name of the person appointed under this subsection and of
16 any successor must be given to the secretary of state and the appropriate administrative rule review committee
17 within 10 days of the appointment.

18 (2) The person appointed under subsection (1) shall review each notice, small business impact
19 statement, and regulatory flexibility analysis by any division, bureau, or other unit of the department, including
20 units attached to the department for administrative purposes only under 2-15-121, for compliance with this
21 chapter before the notice is filed with the secretary of state or before the small business impact statement or
22 regulatory flexibility analysis is provided to the appropriate administrative rule review committee. The reviewer
23 shall pay particular attention to 2-4-302 and 2-4-305. The review must include but is not limited to consideration
24 of:

25 (a) the adequacy of the statement of reasonable necessity for the intended action and whether the
26 intended action is reasonably necessary to effectuate the purpose of the code section or sections implemented;

27 (b) whether the proper statutory authority for the rule is cited;

28 (c) whether the citation of the code section or sections implemented is correct; ~~and~~

29 (d) whether the intended action is contrary to the code section or sections implemented or to other law;
30 and

1 (e) the adequacy of the small business impact statement and the regulatory flexibility analysis.

2 (3) The person appointed under subsection (1) shall sign each notice for which this section requires a
3 review. The act of signing is an affirmation that the review required by this section has been performed to the best
4 of the reviewer's ability. The secretary of state may not accept for filing a notice that does not have the signature
5 required by this section."

6
7 **Section 7.** Section 2-4-314, MCA, is amended to read:

8 **"2-4-314. Biennial review by agencies -- recommendations by committee.** (1) Each agency shall
9 at least biennially review its rules to determine if any new rule should be adopted or any existing rule should be
10 modified or repealed.

11 (2) The determination must be based on:

12 (a) the policy objectives of the statutes implemented by the rules;

13 (b) whether the rule minimizes economic impacts on small businesses in a manner consistent with the
14 stated objective of applicable statutes;

15 (c) the continued need for the rule;

16 (d) the nature and scope of complaints or comments concerning the rule that the agency has received
17 from the public;

18 (e) the complexity of the rule;

19 (f) the extent to which the rule overlaps, duplicates, or conflicts with any other laws or rules; and

20 (g) the length of time and the degree to which technology, economic conditions, or other factors have
21 changed since the rule was adopted or last evaluated.

22 ~~(2)~~(3) The committee may recommend to the legislature ~~these~~ any modifications, additions, or deletions
23 of agency rulemaking authority ~~which~~ that the committee considers necessary."

24
25 **Section 8.** Section 2-4-406, MCA, is amended to read:

26 **"2-4-406. Committee objection to violation of authority for rule -- effect.** (1) If the appropriate
27 administrative rule review committee objects to all or some portion of a proposed or adopted rule because the
28 committee considers it not to have been proposed or adopted in substantial compliance with [section 1], [section
29 2], 2-4-302, 2-4-303, and 2-4-305, the committee shall send a written objection to the agency that promulgated
30 the rule. The objection must contain a concise statement of the committee's reasons for its action.

(2) Within 14 days after the mailing of a committee objection to a rule, the agency promulgating the rule shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

(3) If the committee fails to withdraw or substantially modify its objection to a rule, it may vote to send the objection to the secretary of state, who shall, upon receipt of the objection, publish the objection in the register adjacent to any notice of adoption of the rule and in the ARM adjacent to the rule, provided an agency response must also be published if requested by the agency. Costs of publication of the objection and the agency response must be paid by the committee.

(4) If an objection to all or a portion of a rule has been published pursuant to subsection (3), the agency bears the burden, in any action challenging the legality of the rule or portion of a rule objected to by the committee, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with [section 1], [section 2], 2-4-302, 2-4-303, and 2-4-305. If a rule is invalidated by court judgment because the agency failed to meet its burden of proof imposed by this subsection and the court finds that the rule was adopted in arbitrary and capricious disregard for the purposes of the authorizing statute, the court may award costs and reasonable attorney fees against the agency."

Section 9. Section 2-4-506, MCA, is amended to read:

"2-4-506. Declaratory judgments on validity or application of rules. (1) A rule may be declared invalid or inapplicable in an action filed in district court for declaratory judgment if ~~it is found~~ the court finds that the rule or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff.

(2) A rule may also be declared invalid in ~~such an~~ a declaratory judgment action on the grounds that the rule was adopted:

(a) with an arbitrary or capricious disregard for the purpose of the authorizing statute as evidenced by documented legislative intent; or

(b) in violation of [section 1 or 2].

(3) An action filed for an alleged violation of [section 1 or 2] must be filed within 1 year after the adoption of the rule that is the basis of the allegation.

~~(3)~~(4) A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

(4)(5) The action may be brought in the district court for the county in which the plaintiff resides or ~~has~~ is in which the plaintiff's principal place of business is located or in which the agency maintains its principal office. The agency ~~shall~~ must be made a party to the action."

NEW SECTION. Section 10. Saving clause. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. **Section 11. Codification instruction.** [Sections 1 through 3] are intended to be codified as an integral part of Title 2, chapter 4, part 1, and the provisions of Title 2, chapter 4, part 1, apply to [sections 1 through 3].

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