What Are Administrative Rules?

Because the Montana Legislature meets in regular session only once every 2 years, it sometimes finds it necessary and appropriate to delegate some of its power to other entities. One way it does this is by giving Executive Branch agencies the authority to adopt administrative rules to guide them in administering their programs and services.

These rules are developed under a process outlined in the Montana Administrative Procedure Act (Title 2, chapter 4, MCA). They are published by the Secretary of State's Office in the Administrative Rules of Montana (ARM) and are available online at **arm.sos.mt.gov**.

Once adopted, administrative rules have the force of law. So it is important during the bill drafting process that you recognize when and how you are delegating authority to the Executive Branch through rulemaking.

Delegating Authority

Under the separation of powers doctrine outlined in the Montana Constitution (Art. III, sec. 1), one branch of state government may not exercise the powers properly belonging to another branch. The Legislature generally may not interfere with efforts by the Executive Branch to carry out the purely administrative aspects of the law, such as making specific decisions regarding staffing and resource allocation.

The Legislature may delegate or provide for Executive Branch discretion in carrying out the law only if it provides sufficient statutory standards and criteria to guide an agency. It does this through legislation.

During the bill drafting process, it is important to consider whether a particular legislative proposal does or should delegate authority to the Executive Branch and whether it provides clear standards and criteria by which to do so.

To learn more about the bill drafting process, see

"From Idea to Introduction: A Guide for Legislators on Requesting and Sponsoring Bills,"

also available from the Montana Legislative Services Division.

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Administrative Rules

A Legislator's Guide to Delegating Authority Through the Bill Drafting Process

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Bill Draft Considerations

Following are questions you may wish to consider as you propose legislation, to ensure that you are providing clear authority to the Executive Branch:

Does rulemaking authority already exist?

There are about 775 specific authorizations for the adoption of administrative rules in the Montana Code Annotated (MCA). Authority to adopt rules may already exist for an entire title or a specific chapter, part, or section of law, and this should be determined during the bill drafting process.

Is the authority too broad or broad enough?

Section 5-4-103, MCA, provides that a statute delegating rulemaking authority to an agency must contain specific guidelines describing for the agency and the public what the rules may and may not contain. So you need to consider whether any existing authority will cover the new responsibilities you propose, or whether you need to specify additional authority.

A statement that something must be in accordance with rules adopted by the department or that a person or entity is required to follow rules to be adopted by the department is not a grant of rulemaking authority—it is merely a mandate that department rules on the subject be followed.

An existing program that already includes an express grant of rulemaking authority may be modified or expanded by the Legislature when it amends code sections to which the existing express grant of authority applies or when it enacts a new bill section along with a codification instruction making the existing authority apply to the new bill section.

For more information, please refer to the Legislative Services Division's Bill Drafting Manual or the Montana Administrative Procedure Act, which is contained in Title 2, chapter 4, MCA.

Have I provided clear guidance?

If you are specifying new or additional rulemaking authority in proposed legislation, you should provide a policy, standard, or rule for the agency's guidance. It should be clear, definite, and certain enough that the agency will know its rights and obligations.

Rules have the force of law (i.e., an enforceable prohibition or mandate of behavior or activity) only if:

(1) adopted under an express grant of legislative authority; and

(2) adopted under statutory guidelines sufficiently specific to satisfy the constitutional requirement for a delegation of rulemaking authority under the separation of powers doctrine.

If the standards are clear and simple, you should consider putting them in statute and not granting rulemaking authority.

When the level of specificity required is complex, is highly technical, or needs to be changed frequently outside of the biennial legislative cycle, you may wish to delegate rulemaking authority. The bill should provide the policy or reasons behind the statute and guide the grant of power given to the agency.

If the field is highly technical, complex, or emerging, you may be able to provide only some broad, general standards, but provide whatever level of detail you can at the time.

In a case involving the Clean Air Act of Montana, the Montana Supreme Court ruled that even though the statute was phrased in broad and general language, the delegation was valid because the field of environmental protection lacked detailed and precise standards.

Can I propose a bill to affect existing rules?

A bill may specifically repeal or direct amendment or adoption of an administrative rule.

After a Bill's Passage

What happens after a bill is passed with rulemaking authority?

The agency will develop draft rules. It must give written public notice of its intention to adopt, amend, or repeal any administrative rule. If the agency does not plan to hold a public hearing, it must provide an opportunity for an oral hearing if requested by a sufficient number of those who will be affected by the rule.

When an agency begins to work on the substantive content of a rule, the agency must notify the legislator who was the primary sponsor of legislation authorizing the rule. A former legislator who wishes to receive notice may keep contact information on file with the Secretary of State. Anyone interested in receiving notice of rules may ask to be notified by an agency.

What if an agency hasn't adopted rules?

Pursuant to section 2-4-309, MCA, an agency may proceed with rulemaking under Title 2, chapter 4, MCA, after the enactment of a statute to be implemented by rule. However, a rule may not take effect prior to the effective date of the statute.

Delegations of authority by the Legislature to Executive Branch agencies are not intended to allow an agency to thwart or delay the realization of the benefits of a law. If administrative rules have not been adopted to implement the provisions of a law, the only requirements are those contained in the law.