

1 SENATE BILL NO. 286

2 INTRODUCED BY C. SMITH

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT PROHIBITING CERTAIN RULEMAKING BY STATE AGENCIES;
5 PROHIBITING ANY NEW RULES THAT BURDEN A PERSON'S ABILITY TO ENJOY PROPERTY RIGHTS OR
6 ENGAGE IN A LAWFUL BUSINESS OR OCCUPATION; PROVIDING EXCEPTIONS; PROVIDING A DEFENSE
7 TO CERTAIN ENFORCEMENT ACTIONS AND ALLOWING COSTS AND REASONABLE ATTORNEY FEES
8 TO THE PREVAILING PARTY; PROVIDING DEFINITIONS; AMENDING SECTION 2-4-102, MCA; AND
9 PROVIDING AN APPLICABILITY PROVISION."

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

12
13 NEW SECTION. **Section 1. Prohibition on certain rules -- defense.** (1) After [the effective date of
14 this act], except as provided by subsection (2), an agency may not adopt a rule that will burden a person's ability
15 to:

16 (a) enjoy the person's property rights; or

17 (b) engage in a lawful business or occupation.

18 (2) An agency may adopt a rule otherwise prohibited under subsection (1) if:

19 (a) the rule is part of a comprehensive scheme to reduce existing burdens on a person's ability to enjoy
20 the person's property rights or engage in a lawful business or occupation; or

21 (b) the agency exercises only a definite, nondiscretionary, and ministerial duty that is imposed by law
22 in implementing standards prescribed by the legislature.

23 (3) Violation of this section is a complete defense to an enforcement action of a rule by an agency.

24 (4) The prevailing party in an action asserting a defense under this section is entitled to costs and
25 reasonable attorney fees.

26 (5) As used in this section, the following definitions apply:

27 (a) "Agency" means any board, bureau, commission, department, authority, or officer of the state
28 authorized by law to make rules, except:

29 (i) the legislature and any branch, committee, or officer of the legislature;

30 (ii) the judicial branch and any committee or officer of the judicial branch;

- 1 (iii) the governor, except that an agency is not exempt because the governor has been designated as
2 a member of the agency; or
3 (iv) a school district, unit of local government, or other political subdivision of the state.
4 (b) "Property rights" means an owner's rights to possess, use, and dispose of property.
5 (c) "Rule" means an agency regulation, standard, or statement of general applicability that implements,
6 interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an
7 agency. The term includes the amendment or repeal of a prior rule.

8

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

10 **"2-4-102. (Temporary) Definitions.** For purposes of this chapter, the following definitions apply:

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

13 (2) (a) "Agency", except as provided in [section 1], means an agency, as defined in 2-3-102, of state
14 government, except that the provisions of this chapter do not apply to the following:

15 (i) the state board of pardons and parole, except that the board is subject to the requirements of 2-4-103,
16 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the ARM and the register;

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

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

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

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

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

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

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

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

1 to matters of which the person desires to be given notice.

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

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

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

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

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

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

13 (11) (a) "Rule" means each agency regulation, standard, or statement of general applicability that
14 implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice
15 requirements of an agency. The term includes the amendment or repeal of a prior rule.

16 (b) ~~The~~ Except as provided in [section1], the term does not include:

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

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

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

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

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

30 (12) (a) "Significant interest to the public" means agency actions under this chapter regarding matters

1 that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial
2 fiscal impact to or controversy involving a particular class or group of individuals.

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

4 (13) "Small business" means a business entity, including its affiliates, that is independently owned and
5 operated and that employs fewer than 50 full-time employees.

6 (14) "Substantive rules" are either:

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

9 or

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

12 (Terminates July 1, 2015--sec. 6, Ch. 318, L. 2013.)

13 **2-4-102. (Effective July 2, 2015) Definitions.** For purposes of this chapter, the following definitions
14 apply:

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

17 (2) (a) "Agency", except as provided in [section 1], means an agency, as defined in 2-3-102, of state
18 government, except that the provisions of this chapter do not apply to the following:

19 (i) the state board of pardons and parole, except that the board is subject to the requirements of 2-4-103,
20 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the ARM and the register;

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

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

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

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

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

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

30 (4) "Contested case" means a proceeding before an agency in which a determination of legal rights,

1 duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes
2 but is not restricted to ratemaking, price fixing, and licensing.

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

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

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

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

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

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

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

17 (11) (a) "Rule" means each agency regulation, standard, or statement of general applicability that
18 implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice
19 requirements of an agency. The term includes the amendment or repeal of a prior rule.

20 (b) ~~The~~ Except as provided in [section1], the term does not include:

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

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

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

28 (iv) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when there is
29 a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the
30 seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules

1 is indicated to the public by means of signs or signals; or

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

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

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

8 (13) "Substantive rules" are either:

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

12 (b) adjective or interpretive rules, which may be adopted in accordance with this chapter and under
13 express or implied authority to codify an interpretation of a statute. The interpretation lacks the force of law."
14

15 **NEW SECTION. Section 3. Codification instruction.** [Section 1] is intended to be codified as an
16 integral part of Title 2, chapter 4, and the provisions of Title 2, chapter 4, apply to [section 1].

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18 **NEW SECTION. Section 4. Applicability.** The provisions of [section 1] do not apply to rules adopted
19 solely under constitutionally mandated rulemaking authority.

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