

1 SENATE BILL NO. 225

2 INTRODUCED BY S. FITZPATRICK

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE MONTANA ADMINISTRATIVE
5 PROCEDURE ACT; PROVIDING THAT AN AGENCY MAY NOT ADOPT A RULE THAT IS SUBSTANTIALLY
6 SIMILAR TO LEGISLATION THAT FAILED TO PASS IN THE PREVIOUS REGULAR SESSION OF THE
7 LEGISLATURE; AMENDING SECTIONS 2-4-305 AND 53-6-196, MCA; AND PROVIDING AN IMMEDIATE
8 EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

11
12 **Section 1.** Section 2-4-305, MCA, is amended to read:

13 **"2-4-305. Requisites for validity -- authority and statement of reasons.** (1) (a) The agency shall
14 fully consider written and oral submissions respecting the proposed rule, including comments submitted by the
15 primary sponsor of the legislation prior to the drafting of the substantive content and wording of a proposed rule
16 that initially implements legislation.

17 (b) (i) Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for
18 and against its adoption, incorporating in the statement the reasons for overruling the considerations urged
19 against its adoption. If substantial differences exist between the rule as proposed and as adopted and the
20 differences have not been described or set forth in the adopted rule as that rule is published in the register, the
21 differences must be described in the statement of reasons for and against agency action. When written or oral
22 submissions have not been received, an agency may omit the statement of reasons.

23 (ii) If an adopted rule that initially implements legislation does not reflect the comments submitted by
24 the primary sponsor, the agency shall provide a statement explaining why the sponsor's comments were not
25 incorporated into the adopted rule.

26 (2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to
27 statutory language in order to convey the meaning of a rule interpreting the language, the reference must
28 clearly indicate the portion of the language that is statutory and the portion that is an amplification of the

1 language.

2 (3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking
3 authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and adopted
4 rule must include a citation to the specific section or sections in the Montana Code Annotated that the rule
5 purports to implement. A substantive rule may not be proposed or adopted unless:

6 (a) a statute granting the agency authority to adopt rules clearly and specifically lists the subject
7 matter of the rule as a subject upon which the agency shall or may adopt rules; or

8 (b) the rule implements and relates to a subject matter or an agency function that is clearly and
9 specifically included in a statute to which the grant of rulemaking authority extends.

10 (4) Each rule that is proposed and adopted by an agency and that implements a policy of a governing
11 board or commission must include a citation to and description of the policy implemented. Each agency rule
12 implementing a policy and the policy itself must be based on legal authority and otherwise comply with the
13 requisites for validity of rules established by this chapter.

14 (5) To be effective, each substantive rule adopted:

15 (a) must be within the scope of authority conferred and in accordance with standards prescribed by
16 other provisions of law; and

17 (b) may not implement a policy or relate to a subject matter that is substantially similar to legislation
18 that failed to pass in the previous regular session of the legislature.

19 (6) Whenever by the express or implied terms of any statute a state agency has authority to adopt
20 rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, an adoption,
21 amendment, or repeal of a rule is not valid or effective unless it is:

22 (a) consistent and not in conflict with the statute; ~~and~~

23 (b) not substantially similar to legislation that failed to pass in the previous regular session of the
24 legislature; and

25 (b)(c) reasonably necessary to effectuate the purpose of the statute. A statute mandating that the
26 agency adopt rules establishes the necessity for rules but does not, standing alone, constitute reasonable
27 necessity for a rule. The agency shall also address the reasonableness component of the reasonable necessity
28 requirement by, as indicated in 2-4-302(1) and subsection (1) of this section, stating the principal reasons and

1 the rationale for its intended action and for the particular approach that it takes in complying with the mandate
2 to adopt rules. Subject to the provisions of subsection (8), reasonable necessity must be clearly and thoroughly
3 demonstrated for each adoption, amendment, or repeal of a rule in the agency's notice of proposed rulemaking
4 and in the written and oral data, views, comments, or testimony submitted by the public or the agency and
5 considered by the agency. A statement that merely explains what the rule provides is not a statement of the
6 reasonable necessity for the rule.

7 (7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-
8 302, 2-4-303, or 2-4-306 and this section and unless notice of adoption of the rule is published within 6 months
9 of the publishing of notice of the proposed rule. The measure of whether an agency has adopted a rule in
10 substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section is not whether the agency has
11 provided notice of the proposed rule, standing alone, but rather must be based on an analysis of the agency's
12 substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section. If an amended or supplemental
13 notice of either proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit
14 must be determined with reference to the latest notice in all cases.

15 (8) (a) An agency may use an amended proposal notice or the adoption notice to correct deficiencies
16 in citations of authority for rules and in citations of sections implemented by rules.

17 (b) An agency may use an amended proposal notice but, except for clerical corrections, may not use
18 the adoption notice to correct deficiencies in a statement of reasonable necessity.

19 (c) If an agency uses an amended proposal notice to amend a statement of reasonable necessity for
20 reasons other than for corrections in citations of authority, in citations of sections being implemented, or of a
21 clerical nature, the agency shall allow additional time for oral or written comments from the same interested
22 persons who were notified of the original proposal notice, including from a primary sponsor, if primary sponsor
23 notification was required under 2-4-302, and from any other person who offered comments or appeared at a
24 hearing already held on the proposed rule.

25 (9) If a majority of the members of the appropriate administrative rule review committee notify the
26 committee presiding officer that those members object to all or a portion of a notice of proposed rulemaking, the
27 committee shall notify the agency in writing that the committee objects to all or a portion of the proposal notice
28 and will address the objections at the next committee meeting. Following notice by the committee to the

1 agency, all or a portion of the proposal notice that the committee objects to may not be adopted until publication
2 of the last issue of the register that is published before expiration of the 6-month period during which the
3 adoption notice must be published, unless prior to that time, the committee meets and does not make the same
4 objection. A copy of the committee's notification to the agency must be included in the committee's records.

5 (10) This section applies to the department of labor and industry adopting a rule relating to a
6 commercial drug formulary as provided in 39-71-704. This section does not apply to the automatic updating of
7 department of labor and industry rules relating to commercial drug formularies as provided in 39-71-704."
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9 **Section 2.** Section 53-6-196, MCA, is amended to read:

10 **"53-6-196. Performance-based rulemaking -- privacy exemption.** (1) Except for rules
11 implementing rate increases or implementing federal law or regulation, the notice of a proposed rule concerning
12 the delivery of medicaid services by the department must include, in addition to the other requirements under
13 this chapter:

14 (a) a determination of whether the principal reasons and rationale for the rule can be assessed by
15 performance-based measures and, if such an assessment can be made, the method the department will use to
16 measure whether or not the principal reasons and the rationale for the intended action of the rule, as provided
17 by 2-4-305~~(6)(b)~~(6)(c), are successfully achieved, including any data collection methods or metrics if applicable;
18 and

19 (b) the period over which the intended outcomes will be measured, including any measurement
20 intervals, if applicable.

21 (2) (a) No later than 1 year after the effective date of the rule subject to subsection (1), the
22 department shall prepare a concise statement of findings evaluating whether, using the data collection or metric
23 identified in the rule proposal, the data collected after the rule's effective date indicated that the rule
24 successfully achieved its intended outcomes. The department shall post the statement of findings on its
25 website.

26 (b) The department is not under an obligation to report on any other variables that may have impacted
27 the results of the data collection methods or metrics.

28 (3) The department is exempted from the reporting requirements of subsection (2)(a) to the extent

1 that the requirements would require the publication of confidential information.

2 (4) The department may only use existing resources to fulfill the mandates of this section."

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4 NEW SECTION. **Section 3. Effective date.** [This act] is effective on passage and approval.

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6 NEW SECTION. **Section 4. Applicability.** [This act] applies to administrative rules adopted or
7 amended on or after [the effective date of this act].

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