

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."
9

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 THE LAST
18 VERSION OF legislation that failed to pass in the previous regular session of the legislature. LEGISLATION IS
19 CONSIDERED TO HAVE FAILED IF, FOLLOWING INTRODUCTION AND A HEARING IN AT LEAST ONE COMMITTEE, THE
20 LEGISLATION IS NOT ENACTED AND WAS TABLED IN COMMITTEE, FAILED A FLOOR VOTE, OR WAS VETOED. FOR THE
21 PURPOSES OF THIS SUBSECTION (5)(B), A DETERMINATION OF "SUBSTANTIALLY SIMILAR" MUST BE BASED ON:

22 (i) THE POLICY GOALS AND LEGISLATIVE HISTORY OF THE FAILED LEGISLATION; AND

23 (ii) TEXTUAL SIMILARITIES BETWEEN THE RULE AND THE FAILED LEGISLATION.

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

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

28 (b) not substantially similar to THE LAST VERSION OF legislation that failed to pass in the previous

1 regular session of the legislature; and. LEGISLATION IS CONSIDERED TO HAVE FAILED IF, FOLLOWING INTRODUCTION
 2 AND A HEARING IN AT LEAST ONE COMMITTEE, THE LEGISLATION IS NOT ENACTED AND WAS Tabled IN COMMITTEE,
 3 FAILED A FLOOR VOTE, OR WAS VETOED. FOR THE PURPOSES OF THIS SUBSECTION (6)(B), A DETERMINATION OF
 4 "SUBSTANTIALLY SIMILAR" MUST BE BASED ON:

5 (I) THE POLICY GOALS AND LEGISLATIVE HISTORY OF THE FAILED LEGISLATION; AND

6 (II) TEXTUAL SIMILARITIES BETWEEN THE RULE AND THE FAILED LEGISLATION.

7 ~~(b)~~(c) reasonably necessary to effectuate the purpose of the statute. A statute mandating that the
 8 agency adopt rules establishes the necessity for rules but does not, standing alone, constitute reasonable
 9 necessity for a rule. The agency shall also address the reasonableness component of the reasonable necessity
 10 requirement by, as indicated in 2-4-302(1) and subsection (1) of this section, stating the principal reasons and
 11 the rationale for its intended action and for the particular approach that it takes in complying with the mandate
 12 to adopt rules. Subject to the provisions of subsection (8), reasonable necessity must be clearly and thoroughly
 13 demonstrated for each adoption, amendment, or repeal of a rule in the agency's notice of proposed rulemaking
 14 and in the written and oral data, views, comments, or testimony submitted by the public or the agency and
 15 considered by the agency. A statement that merely explains what the rule provides is not a statement of the
 16 reasonable necessity for the rule.

17 (7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-
 18 302, 2-4-303, or 2-4-306 and this section and unless notice of adoption of the rule is published within 6 months
 19 of the publishing of notice of the proposed rule. The measure of whether an agency has adopted a rule in
 20 substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section is not whether the agency has
 21 provided notice of the proposed rule, standing alone, but rather must be based on an analysis of the agency's
 22 substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section. If an amended or supplemental
 23 notice of either proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit
 24 must be determined with reference to the latest notice in all cases.

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

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

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

7 (9) If a majority of the members of the appropriate administrative rule review committee notify the
 8 committee presiding officer that those members object to all or a portion of a notice of proposed rulemaking, the
 9 committee shall notify the agency in writing that the committee objects to all or a portion of the proposal notice
 10 and will address the objections at the next committee meeting. Following notice by the committee to the
 11 agency, all or a portion of the proposal notice that the committee objects to may not be adopted until publication
 12 of the last issue of the register that is published before expiration of the 6-month period during which the
 13 adoption notice must be published, unless prior to that time, the committee meets and does not make the same
 14 objection. A copy of the committee's notification to the agency must be included in the committee's records.

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

20 **"53-6-196. Performance-based rulemaking -- privacy exemption.** (1) Except for rules
 21 implementing rate increases or implementing federal law or regulation, the notice of a proposed rule concerning
 22 the delivery of medicaid services by the department must include, in addition to the other requirements under
 23 this chapter:

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

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

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

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

10 (3) The department is exempted from the reporting requirements of subsection (2)(a) to the extent
11 that the requirements would require the publication of confidential information.

12 (4) The department may only use existing resources to fulfill the mandates of this section."
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14 NEW SECTION. Section 3. Effective date. [This act] is effective on passage and approval.
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16 NEW SECTION. Section 4. Applicability. [This act] applies to administrative rules adopted or
17 amended on or after [the effective date of this act].
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