



Economic Affairs Interim Committee

66th Montana Legislature

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July 2, 2020

Director Sheila Hogan
Montana Department of Public Health and Human Services
111 North Sanders Street
Helena, MT 59601

Dear Director Hogan,

A majority of the members of the Economic Affairs Interim Committee (EAIC) formally objected to Montana Administrative Register Notice 37-923. This notice relates to the Department of Public Health and Human Services' (DPHHS) proposed rule to prohibit the sale, offer for sale, giving, marketing, advertising, or distribution of flavored electronic smoking devices to all persons within Montana.

The EAIC made its objection under 2-4-406, MCA. This statute allows the committee to object to a rule if it believes the rule was not proposed or adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305. The salient statute, 2-4-305(3) and (5), provides:

(3) [...] A substantive rule may not be proposed or adopted unless:

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

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

[...]

(5) To be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

The EAIC maintains that DPHHS's notice was not adopted in substantial compliance with 2-4-305(3) and (5) because there is no statute that clearly and specifically provides authority for DPHHS's wholesale prohibition on all flavored electronic smoking devices; therefore, the proposed rule is not within the scope of authority that is statutorily conferred. Specifically, the EAIC maintains that DPHHS's claimed authority in 50-1-202(1)(p)(i) is insufficient to justify an

absolute statewide ban on all flavored electronic smoking devices. Indeed, 50-1-202(1)(p)(i) merely provides DPHHS with the authority to adopt rules relating to "the reporting and control of communicable diseases and other conditions of public health importance." The obvious conclusion is that this statute provides nothing relating to flavored electronic smoking devices -- let alone providing DPHHS's authority for a blanket embargo -- and there is no statutory authority that DPHHS can rely upon to link flavored electronic smoking devices with this authority. Furthermore, the widespread deleterious economic impact that this rule would wreak serves as evidence that any blanket ban on flavored electronic smoking devices should be through legislative act and not through an administrative rule. The EAIC, tasked with overseeing economic issues facing this state, maintains that this action is critical. Finally, the 2019 Legislature has made clear that flavored electronic smoking devices are allowed in this state. House Bill 312, a bill generally aimed at prohibiting these, was tabled by the House Business and Labor Committee. In sum, the EAIC maintains that DPHHS has exceeded its statutory rulemaking authority.

Section 2-4-406 requires DPHHS to respond in writing to the committee within 14 days after the mailing of a committee objection to a rule. After receipt of the response, the committee may withdraw or modify its objection.

Under 2-4-406, 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 that DPHHS's response must also be published if requested. DPHHS would bear 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 2-4-302, 2-4-303, and 2-4-305.

Additionally, under 2-4-305, if the committee does not withdraw its objection, DPHHS's proposed rule is not effective until the day after final adjournment of the regular session of the legislature that begins after the notice proposing the rule was published by the secretary of state. That notwithstanding, the committee may generally withdraw its objection before the proposed rule is adopted.

Thank you for your attention in this matter.

Sincerely,



Rep. Sharon Stewart Peregoy, Presiding Officer