

Administrative Rule Review

State Administration & Veterans' Affairs Interim Committee

June, 2020

Montana Administrative Procedure Act

2-4-303. Emergency or temporary rules. (1) (a) If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice and states in writing its reasons for that finding, it may proceed upon special notice filed with the committee, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period not longer than 120 days, after which a new emergency rule with the same or substantially the same text may not be adopted, but the adoption of an identical rule under 2-4-302 is not precluded. Because the exercise of emergency rulemaking power precludes the people's constitutional right to prior notice and participation in the operations of their government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against abuse. An emergency rule may be adopted only in circumstances that truly and clearly constitute an existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any other administrative act. The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare is subject to judicial review upon petition by any person. The matter must be set for hearing at the earliest possible time and takes precedence over all other matters except older matters of the same character. The sufficiency of the reasons justifying a finding of imminent peril and the necessity for emergency rulemaking must be compelling and, as written in the rule adoption notice, must stand on their own merits for purposes of judicial review. The dissemination of emergency rules required by 2-4-306 must be strictly observed and liberally accomplished

Electronic Notary Stamps

NEW RULE | OFFICIAL STAMP (1) An electronic image of the official stamp of a notary public authorized to perform remote or remote online notarizations may be different in size, format, content, or border design as long as it is reasonably consistent with the official notary stamp requirements of ARM 44.15.107 and the Secretary of State's office has been notified of the discrepancy.

Montana Administrative Procedure Act

2-4-306. Filing and format — adoption and effective dates — dissemination of emergency rules. . . .

(1) . . . A rule is **adopted** on the date that the adoption notice is filed with the secretary of state and is effective on the date referred to in subsection (4), except that if the secretary of state requests corrections to the adoption notice, the rule is adopted on the date that the revised notice is filed with the secretary of state.

. . .

(4) Each rule is effective after publication in the register, as provided in 2-4-312, except that:

. . .

(ii) an emergency rule is **effective** at a stated date following publication in the register or immediately upon filing with the secretary of state if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of reasons for the finding must be filed with the rule. The agency shall, in addition to the required publication in the register, take appropriate and extraordinary measures to make emergency rules known to each person who may be affected by them.

Exerpt of MAR Notice No. 44-2-238

3. The temporary emergency rule is effective April 8, 2020.

4. The text of the temporary emergency rule provides as follows:

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AUTH: 1-5-628, MCA

IMP: 1-5-616(2), MCA

5. The rationale for the temporary emergency rule is set forth in paragraph 1.

6. The Secretary of State maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in paragraph 2 above or may be made by completing a request form at any rules hearing held by the department.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

/s/ Austin James

Austin James
Rule Reviewer
Attorney

/s/ Dana Corson

Dana Corson
Director
Office of Secretary of State

Dated April 8, 2020.

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AUTH: 1-5-628, MCA

IMP: 1-5-616(2), MCA

1-5-616. Official signature and stamp. . . .

(2) The official stamp of a notary public must:

...

(c) if an electronic image, be the same format, color, content, and approximate size as the tangible official stamp and capable of being copied together with the record to which the official stamp is affixed or attached or with which the official stamp is logically associated.

Montana Administrative Procedure Act

2-4-305. Requisites for validity — authority and statement of reasons.

...

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

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

(b) reasonably necessary to effectuate the purpose of the statute.

(7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-302, 2-4-303, or 2-4-306 The measure of whether an agency has adopted a rule in substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section is not whether the agency has provided notice of the proposed rule, standing alone, but rather must be based on an analysis of the agency's substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section.

Committee Authority

After Rulemaking Process

- Object to an adopted rule under 2-4-406, MCA, for purposes of shifting the burden of showing legality of adoption was not in substantial compliance with 2-4-302, 2-4-303 (requiring special notice to the rule review committee), or 2-4-305 (requiring consistency with the statute)

- Recommend amendment, rejection, or repeal of rule (2-4-402, 2-4-411, and 2-4-412, MCA).
 - Rule expires 120 days after adoption (August 6, 2020)

Objection for Purposes of Shifting the Burden of Proof to Show that the Rules was Adopted in Substantial Compliance with 2-4-302, 2-4-303, and 2-4-305 [2-4-406]

1. If the appropriate administrative rule review committee objects to all or some portion of a proposed or adopted rule because the committee considers it not to have been proposed or adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, the committee shall send a written objection to the agency that promulgated the rule. The objection must contain a concise statement of the committee's reasons for its action.

Within 14 days after the mailing of a committee objection to a rule, the agency promulgating the rule shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

2. 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 an agency response must also be published if requested by the agency. Costs of publication of the objection and the agency response must be paid by the committee.

3. If an objection to all or a portion of a rule has been published pursuant to subsection (3), the agency bears 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. If a rule is invalidated by court judgment because the agency failed to meet its burden of proof imposed by this subsection and the court finds that the rule was adopted in arbitrary and capricious disregard for the purposes of the authorizing statute, the court may award costs and reasonable attorney fees against the agency

Note: Failure of the legislature or the appropriate administrative rule review committee to object in any manner to the adoption, amendment, or repeal of a rule is inadmissible in the courts of this state to prove the validity of any rule.