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## Economic Affairs Interim Committee

67th Montana Legislature

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June 23, 2022

Laurie Esau  
Commissioner, Montana Department of Labor and Industry  
1315 Lockey Ave  
PO Box 1728  
Helena, MT 59624-1728

Dear Commissioner Esau,

A majority of the members of the Economic Affairs Interim Committee (EAIC) formally objected to Montana Administrative Register (MAR) Notice No. 24-2-390. This notice relates to the Department Labor and Industry's adopted rule relating to public participation.

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 sections 2-4-302, 2-4-303, and 2-4-305, MCA:

**2-4-406. Committee objection to violation of authority for rule — effect.** (1) Subject to 2-4-112, 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.

(2) 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.

(3) Subject to 2-4-112, 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.

(4) 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.

Additionally, the salient statute at issue here, 2-4-305(5) and (6), MCA, provides:

(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.

(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. [...]

The EAIC maintains that the department's rules were not adopted in substantial compliance with 2-4-305(5) and (6), MCA, because the rules do not go far enough to ensure that the department receive public comment. Montana Code Annotated section 2-3-103 requires every agency to "develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public." Put simply, the adopted rules should provide more avenues for which the public may provide public comment and provide more definitive procedures that would require agency action.

Section 2-4-406, MCA, requires the department 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, MCA, 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, on receipt of the objection, publish the objection in the register adjacent to any notice of adoption of the rule and in the Administrative Rules of Montana adjacent to the rule, provided that the department's response must also be published if requested. The department 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, MCA.

Thank you for your attention in this matter.

Sincerely,

/s/

Senator Kenneth Bogner, Presiding Officer