

Chapter 92-166

Committee Substitute for Senate Bill No. 1354

AN ACT relating to administrative procedures; amending s. 120.53, F.S.; authorizing electronic retrieval systems in lieu of subject-matter index for agency orders; requiring that final orders issued under s. 120.535, F.S., pertaining to rule challenge proceedings, be included in the subject-matter index that an agency must make available for public inspection and copying; amending s. 120.54, F.S.; conforming definition of small business to definition in Small and Minority Business Assistance Act of 1985; specifying legislative finding regarding official reporters of Public Employees Relations Commission; amending s. 120.54, F.S.; providing for additional notice; providing for public workshops for the development of proposed rules under certain circumstances; providing conditions in which economic impact statements must be prepared; providing additional requirements for economic impact statements; providing additional requirements for petitions seeking determinations of invalidity of rules; providing for additional agency considerations in rulemaking; amending s. 120.535, F.S.; providing exceptions to requirement that agency statements be adopted as rules; amending s. 11.60, F.S.; providing the Administrative Procedures Committee with standing to seek administrative or judicial review of the validity of rules; amending s. 120.54, F.S.; providing for review of emergency rules by the committee; amending s. 120.545, F.S.; providing additional criteria for committee review of agency rules; requiring the committee to consult with substantive committees when reviewing rules; providing for notice to the Speaker of the House of Representatives and the President of the Senate when the committee objects to a rule; amending s. 120.52, F.S.; amending the definition of a party under the Administrative Procedure Act; amending s. 120.68, F.S.; providing for judicial review of certain petitions challenging the validity of rules; creating s. 120.543, F.S.; providing an alternate procedure for adoption of agency rules substantively identical to previously adopted federal regulations; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (2) of section 120.53, Florida Statutes, as amended by section 2 of chapter 91-30, Laws of Florida, as amended, is amended to read:

120.53. Adoption of rules of procedure and public inspection

(2)(a) Each agency shall make available for public inspection and copying, at no more than cost:

1. All rules formulated, adopted, or used by the agency in the discharge of its functions.

2. All agency orders.

3. A current subject-matter index, identifying for the public any rule or order as specified in this subparagraph. In lieu of the requirement for making available for public inspection and copying a hierarchical subject-matter index of its orders, an agency may maintain, and make available for public use, an electronic data base of its orders that allows users to research and retrieve the full texts of agency orders by devising an ad hoc indexing system employing any logical search terms in common usage which are composed by the user and which are contained in the orders of the agency. The agency orders that must be indexed, unless excluded under paragraph (c) or paragraph (d), include:

a. Each final agency order resulting from a proceeding under s. 120.57(1) or (2);

b. Each final agency order rendered pursuant to s. 120.57(3) which contains a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value;

c. Each declaratory statement issued by an agency; and

d. Each final order resulting from a proceeding under s. 120.535, s. 120.54(4), or s. 120.56.

4. A list of all final orders rendered pursuant to s. 120.57(3) which have been excluded from the indexing requirement of this section, with the approval of the Department of State, because they do not contain statements of agency policy or statements of precedential value. The list must include the name of the parties to the proceeding and the number assigned to the final order.

5. All orders listed pursuant to subparagraph 4.

Section 2. Paragraph (a) of subsection (2) of section 120.54, Florida Statutes, is amended to read:

120.54. Rulemaking; adoption procedures

(2)(a) Each agency, prior to the adoption, amendment, or repeal of any rule, shall consider the impact of such proposed action on small business as defined in s. 288.703 ~~the Florida Small and Minority Business Assistance Act~~

of 1985 and, whenever possible, shall tier such rule to reduce disproportionate impacts on small business and to avoid regulating businesses which do not contribute significantly to the problem the rule is designed to regulate. An agency may define "small business" to include more than 50 ~~25~~ persons if it finds that such a definition is necessary to adapt any rule to the needs and problems of small business. The agency shall consider each of the following methods for reducing the impact of the proposed rule on small business:

1. Establishing less stringent compliance or reporting requirements in the rule for small business.
2. Establishing less stringent schedules or deadlines in the rule for compliance or reporting requirements for small business.
3. Consolidating or simplifying the rule's compliance or reporting requirements for small business.
4. Establishing performance standards to replace design or operational standards in the rule for small business.
5. Exempting small business from any or all requirements of the rule.

(b) Each agency shall provide information on its proposed action by preparing a detailed economic impact statement. The economic impact statement shall include:

1. An estimate of the cost to the agency of the implementation of the proposed action, including the estimated amount of paperwork;
2. An estimate of the cost or the economic benefit to all persons directly affected by the proposed action;
3. An estimate of the impact of the proposed action on competition and the open market for employment, if applicable;
4. A detailed statement of the data and method used in making each of the above estimates; and
5. An analysis of the impact on small business as defined in the Florida Small and Minority Business Assistance Act of 1985.

(c) If an economic impact statement is required before an agency takes action on an application or petition by any person, the statement shall be prepared within a reasonable time after the application is made or the petition is filed.

(d) The failure to provide an adequate statement of economic impact is a ground for holding the rule invalid; however, beginning October 1, 1978, no rule shall be declared invalid for want of an adequate statement of economic impact unless the issue is raised in an administrative or judicial proceeding within 1 year of the effective date of the rule to which the statement applies.

Section 3. The Legislature finds that the official reporters used by the Public Employees Relations Commission on May 28, 1991, are in compliance with the requirements for indexing and availability of orders in section 120.53(2)(a), Florida Statutes, as amended by section 2 of chapter 91-30, Laws of Florida.

Section 4. Subsections (1), (2), and (12) of section 120.54, Florida Statutes, are amended to read:

120.54. Rulemaking; adoption procedures

(1) Prior to the adoption, amendment, or repeal of any rule not described in subsection (9), an agency shall give notice of its intended action, setting forth a short and plain explanation of the purpose and effect of the proposed rule, and the specific legal authority under which its adoption is authorized; ~~and a summary of the estimate of the economic impact of the proposed rule on all persons affected by it.~~

(a) Except as otherwise provided in this paragraph, the notice shall be mailed to the committee, to all persons named in the proposed rule, and to all persons who have made requests of the agency for advance notice of its proceedings at least 14 days prior to such mailing. The agency shall also give such notice as is prescribed by rule to those particular classes of persons to whom the intended action is directed. Notice of intent by an educational unit to adopt, amend, or repeal any rule not described in subsection (9) shall be made:

1. By publication in a newspaper of general circulation in the affected area;
2. By mail to all persons who have made requests of the educational unit for advance notice of its proceedings and to organizations representing persons affected by the proposed rule; and
3. By posting in appropriate places so that those particular classes of persons to whom the intended action is directed may be duly notified.

Such publication, mailing, and posting of notice shall occur at least 21 days prior to the intended action.

(b) The notice shall be published in the Florida Administrative Weekly not less than 28 days prior to the intended action, except that notice of actions proposed by educational units or units of government with jurisdiction in only one county or a part thereof need not be published in the Florida Administrative Weekly or transmitted to the committee. The proposed rule shall be available for inspection and copying by the public at the time of the publication of notice.

(c) Prior to providing notice of a proposed rule as required by paragraphs (1)(a) and (b), an agency may provide notice of the development of proposed rules by publication of a notice of rule development in the Florida Administrative Weekly. Notice of rule development shall indicate the subject area which will be addressed by rule development, provide a short plain explanation of the purpose and effect of the rule development, the specific legal authority for rule development, and the preliminary text of proposed rules if available.

(d) An agency may hold a public workshop for purposes of rule development. If an agency provides notice of rule development under paragraph (1)(c), the agency shall hold a public workshop for purposes of rule development if requested by any affected person. Notwithstanding the provisions of s. 120.53(1)(d) or any other provision of law, notice of a rule development workshop shall be by publication in the Florida Administrative Weekly not less than 14 days prior to the date on which the workshop is scheduled to be held and shall indicate the subject area which will be addressed, the agency contact person, and the place, date, and time of the workshop.

(e) If an agency provides notice of rule development under paragraph (1)(c), and an economic impact statement is prepared pursuant to paragraph (2)(b), prior to notice of proposed rules under paragraphs (1)(a) and (b), the agency shall make a draft copy of the economic impact statement available to any person who requests a copy of the statement.

(2)(a) Each agency, prior to the adoption, amendment, or repeal of any rule, shall consider the impact of such proposed action on small business as defined in the Florida Small and Minority Business Assistance Act of 1985 and, whenever possible, shall tier such rule to reduce disproportionate impacts on small business and to avoid regulating businesses which do not contribute significantly to the problem the rule is designed to regulate. An agency may define "small business" to include more than 25 persons if it finds that such a definition is necessary to adapt any rule to the needs and problems of small business. The agency shall consider each of the following methods for reducing the impact of the proposed rule on small business:

1. Establishing less stringent compliance or reporting requirements in the rule for small business.

2. Establishing less stringent schedules or deadlines in the rule for compliance or reporting requirements for small business.

3. Consolidating or simplifying the rule's compliance or reporting requirements for small business.

4. Establishing performance standards to replace design or operational standards in the rule for small business.

5. Exempting small business from any or all requirements of the rule.

(b) Prior to the adoption, amendment, or repeal of any rule not described in subsection (9), an ~~Each~~ agency may ~~shall~~ provide information on its proposed action by preparing ~~an a-detailed~~ economic impact statement, and must prepare an economic impact statement if:-

1. The agency determines that the proposed action would result in a substantial increase in costs or prices paid by consumers, individual industries, or state or local government agencies, or would result in significant adverse effects on competition, employment, investment, productivity, or innovation, and alternative approaches to the regulatory objective exist and are not precluded by law; or

2. Within 14 days after the date of publication of the notice provided pursuant to paragraph (1)(c) or, if no notice of rule development is provided, within 21 days after the notice required by paragraphs (1)(a) and (b), a written request for preparation of an economic impact statement is filed with the appropriate agency by the Governor, a body corporate and politic, at least 100 people signing a request, or an organization representing at least 100 persons, or any domestic nonprofit corporation or association.

An agency's determination regarding preparation of an economic impact statement pursuant to subparagraph (2)(b)1. shall not be subject to challenge. If an economic impact statement is prepared pursuant to paragraph (2)(b), at least 14 days prior to any public hearing on a proposed rule held pursuant to subsection (3), the agency shall make a draft copy of the economic impact statement available to any person who requests a copy of the statement.

(c) The economic impact statement must ~~shall~~ include:

1. An estimate of the cost to the agency, and to any other state or local government entities, of implementing and enforcing ~~of the implementation of~~

the proposed action, including the estimated amount of paperwork, and any anticipated effect on state or local revenues;

2. An estimate of the cost or the economic benefit to all persons directly affected by the proposed action;

3. An estimate of the impact of the proposed action on competition and the open market for employment, if applicable;

~~4. A detailed statement of the data and method used in making each of the above estimates; and~~

~~4.5. An analysis of the impact on small business as defined in the Florida Small and Minority Business Assistance Act of 1985.~~

5. A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of not adopting the rule;

6. A determination of whether less costly methods or less intrusive methods exist for achieving the purpose of the proposed rule where reasonable alternative methods exist which are not precluded by law;

7. A description of any reasonable alternative methods, where applicable, for achieving the purpose of the proposed rule which were considered by the agency, and a statement of the reasons for rejecting those alternatives in favor of the proposed rule; and

8. A detailed statement of the data and methodology used in making the estimates required by this paragraph.

~~(c) If an economic impact statement is required before an agency takes action on an application or petition by any person, the statement shall be prepared within a reasonable time after the application is made or the petition is filed.~~

~~(d) The failure to provide an adequate statement of economic impact is a ground for holding the rule invalid; however, beginning October 1, 1978, No rule shall be declared invalid based on a challenge to for want of an adequate statement of the economic impact statement for the rule unless the issue is raised in an administrative or judicial proceeding within 1 year of the effective date of the rule to which the statement applies. No person shall have standing to challenge an agency rule, based upon an economic impact statement or lack thereof, unless that person requested preparation of an economic impact statement under subparagraph (2)(b)2. and provided the agency with information sufficient to make the agency aware of specific concerns regarding the economic impact of the proposed rule, by either participation in~~

a public workshop, public hearing, or by submission of written comments, regarding the rule. The grounds for invalidation of a rule based upon a challenge to the economic impact statement for the rule, are limited to an agency's failure to adhere to the procedure for preparation of an economic impact statement provided by this section, or an agency's failure to consider information submitted to the agency regarding specific concerns about the economic impact of a proposed rule when such failure substantially impairs the fairness of the rulemaking proceeding.

(12)(a) Whenever an act of the Legislature is enacted which requires implementation of the act by rules of an agency within the executive branch of state government, such rules shall be drafted and formally proposed as provided in this section ~~herein~~ within 180 days after ~~of~~ the effective date of the act, unless ~~the provisions of the act provides~~ provide otherwise.

(b) In adopting rules, all agencies must, among the alternative approaches to any regulatory objective and, to the extent allowed by law, choose the alternative that imposes the lowest net cost to society based upon the factors listed in paragraph (2)(c), or provide a statement of the reasons for rejecting that alternative in favor of the proposed rule. This paragraph shall not provide a basis for challenging a rule.

Section 5. Subsection (10) is added to section 120.535, Florida Statutes, to read:

120.535. Rulemaking required

(10) Agency statements that relate to cost-recovery clauses, factors, or mechanisms implemented pursuant to chapter 366 are exempt from the requirements of this section.

Section 6. Paragraph (k) of subsection (2) of section 11.60, Florida Statutes, is amended to read:

11.60. Administrative Procedures Committee; creation; membership; powers; duties

(2) The committee shall:

(k) Have standing to seek administrative and judicial review ~~in the courts of the state~~, on behalf of the Legislature or the citizens of this state, of the validity or invalidity of any administrative rule to which the committee has voted an objection and which has not been withdrawn, modified, repealed, or amended to meet the objection. Judicial review under this paragraph shall not be initiated until the Governor and the agency head of the agency making the rule to which the committee has objected have been notified of the

committee's proposed action and have been given a reasonable opportunity for consultation with the committee. The committee is authorized to expend public funds from its appropriation for the purpose of seeking judicial review.

Section 7. Effective upon becoming a law, paragraph (a) of subsection (9) of section 120.54, Florida Statutes, is amended to read:

120.54. Rulemaking; adoption procedures

(9)(a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger by any procedure which is fair under the circumstances and necessary to protect the public interest, provided that:

1. The procedure provides at least the procedural protection given by other statutes, the Florida Constitution, or the United States Constitution.

2. The agency takes only that action necessary to protect the public interest under the emergency procedure.

3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one county or a part thereof, including the full text of the rules, shall be published in the first available issue of the Florida Administrative Weekly and provided to the committee. The agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

Section 8. Effective upon becoming a law, subsection (1) of section 120.545, Florida Statutes, is amended to read:

120.545. Committee review of agency rules

(1) As a legislative check on legislatively created authority, the committee shall examine each proposed rule, except for those proposed rules exempted by s. 120.54(11)(a), and its accompanying material, each emergency rule, and may examine any existing rule, for the purpose of determining whether:

(a) The rule is an invalid exercise of delegated legislative authority;

(b) The statutory authority for the rule has been repealed;

(c) The rule reiterates or paraphrases statutory material;

(d) The rule is in proper form;

(e) The notice given prior to its adoption was sufficient to give adequate notice of the purpose and effect of the rule; and

(f) An ~~The~~ economic impact statement was prepared that informs ~~accompanying the rule is adequate to accurately inform~~ the public of the economic effect of the rule, if such statement is required pursuant to paragraph (2)(b) or is requested by the committee.

(g) The rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements.

(h) The rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law which the rule implements.

(i) The rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule.

(j) The rule could be made less complex or more easily comprehensible to the general public.

(k) The rule reflects the approach to the regulatory objective involving the lowest net cost to society to the degree consistent with the provisions of law which the rule implements.

(l) The rule will require additional appropriations.

(m) If the rule is an emergency rule, there exists an emergency justifying the promulgation of such rule, whether the agency has exceeded the scope of its statutory authority, and whether the rule was promulgated in compliance with the requirements and limitations of s. 120.54(9).

The committee may request from an agency such information as is reasonably necessary for examination of a rule as required by this subsection. The committee shall consult with legislative standing committees with jurisdiction over the subject areas pertinent to any rule examined regarding legislative authority for the rule. If the committee objects to an emergency, a proposed or existing rule, it shall, within 5 days of the objection, certify that fact to the agency whose rule has been examined and include with the certification a statement detailing its objections with particularity. The committee shall notify the Speaker of the House of Representatives and the President of the Senate of any objection to an agency rule concurrent with certification of that fact to the agency. Such notice shall include a copy of the rule and the statement detailing the committee's objections to the rule.

Section 9. Subsection (12) of section 120.52, Florida Statutes, is amended to read:

120.52. Definitions

As used in this act:

(12) "Party" means:

(a) Specifically named persons whose substantial interests are being determined in the proceeding.

(b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

(c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.

(d) Any county representative, agency, department, or unit funded and authorized by state statute or county ordinance to represent the interests of the consumers of a county, when the proceeding involves the substantial interests of a significant number of residents of the county and the board of county commissioners has, by resolution, authorized the representative, agency, department, or unit to represent the class of interested persons. The authorizing resolution shall apply to a specific proceeding and to appeals and ancillary proceedings thereto, and it shall not be required to state the names of the persons whose interests are to be represented.

Prisoners as defined in s. 944.02(5) may obtain or participate in proceedings under s. 120.54(3) or, ~~(4), (5) or (9) or s. 120.56 and may be parties under s. 120.68 to seek judicial review of those proceedings.~~ Prisoners shall not be considered parties in any other proceedings and may not seek judicial review under s. 120.68 of any other agency action. Parolees shall not be considered parties for purposes of agency action or judicial review when the proceedings relate to the rescission or revocation of parole.

Section 10. Subsection (15) is added to section 120.68, Florida Statutes, to read:

120.68. Judicial Review

(15) No petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.54(4)

or s. 120.56, unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.

Section 11. Section 120.543, Florida Statutes, is created to read:

120.543. Adoption of federal standards

Notwithstanding any contrary provision of s. 120.54, in the pursuance of state implementation, operation, or enforcement of federal programs, the agency head is empowered to adopt rules substantively identical to regulations adopted pursuant to federal law, in accordance with the following procedures:

(1) The agency head shall publish notice of intent to adopt a rule pursuant to this section in the Florida Administrative Weekly at least 21 days prior to filing the rule with the Department of State. The agency head shall provide a copy of the notice of intent to adopt a rule to the Administrative Procedures Committee at least 21 days prior to the date of filing with the Department of State. Prior to filing the rule with the Department of State, the agency head shall consider any written comments received within 14 days after the date of publication of the notice of intent to adopt a rule. The rule shall be adopted upon filing with the Department of State. Substantive changes from the rules as noticed shall require republishing of notice as required in this section.

(2) Any rule adopted pursuant to this section shall become effective upon the date designated in the rule by the agency head; however, no such rule shall become effective earlier than the effective date of the substantively identical federal regulation.

(3) Any substantially affected person may, within 14 days after the date of publication of the notice of intent to adopt a rule, file an objection to rulemaking with the agency head. The objection shall specify the portions of the proposed rule to which the person objects and the specific reasons for the objection. The agency shall not proceed pursuant to this section, to adopt those portions of the proposed rule specified in an objection, unless the agency deems the objection to be frivolous, but may proceed pursuant to s. 120.54. An objection to a proposed rule, which rule in no material respect differs from the requirements of the federal regulation upon which it is based, is deemed to be frivolous.

(4) Whenever any federal regulation adopted as an agency rule pursuant to this section is declared invalid, or withdrawn, revoked, repealed, remanded, or suspended, the agency head shall, within 60 days thereafter, publish a notice of repeal of the substantively identical agency rule in the Florida Administrative Weekly. Such repeal is effective upon publication of the notice. Whenever any federal regulation adopted as an agency rule pursuant to this section is substantially amended, the agency may adopt the amended

regulation as a rule. If the amended regulation is not adopted as a rule within 180 days of the effective date of the amended regulation, the original rule is deemed repealed and the agency shall publish a notice of repeal of the original agency rule in the next available Florida Administrative Weekly.

(5) Whenever all or part of any rule proposed for adoption by the agency is substantively identical to a regulation adopted pursuant to federal law, such rule shall be written in a manner so that the rule specifically references such regulation whenever possible.

Section 12. Except as otherwise provided herein, this act shall take effect July 1, 1992.

Became a law without the Governor's approval April 9, 1992.