

2008 SUMMARY OF AMENDMENTS TO CHAPTER 120

Chapter 2008-4, Laws of Florida, a reviser's bill, amended subsection 120.545(9), F.S., to clarify that the reference to Weekly means the Florida Administrative Weekly.
Effective date: July 1, 2008.

Chapter 2008-6, Laws of Florida, a reviser's bill, amended subsection 120.80(15), F.S., to change the reference to the "Secretary of Health" to the "State Surgeon General."
Effective date: July 1, 2008.

Chapter 2008-104, Laws of Florida, amended several sections of Chapter 120:

Section 120.52

- Subsection 120.52(8), flush left paragraph, is amended to strike the phrase "by the same statute" and replace it with "by the enabling statute."
- Subsection 120.52(9) defines the term "law implemented" to mean the enabling statute being carried out or interpreted by an agency through rulemaking.
- Subsection 120.52(17) defines the term "rulemaking authority" to mean statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term "rule."
- Subsection 120.52(20) defines the term "unadopted rule" to mean an agency statement that meets the definition of a rule, but that has not been adopted pursuant to the requirements of s. 120.54.

Section 120.53

- Paragraph 120.53(2)(a) is amended to provide that agencies may comply with final order indexing requirements by electronically transmitting to the Division of Administrative Hearings a copy of such orders for posting on the Division's website.

Section 120.536

- Subsection 120.536(1) is amended to strike the phrase "by the same statute" and replace it with "by the enabling statute."

Section 120.54

- Effective January 1, 2009, paragraph 120.54(1)(a) is amended to delete the provision that rulemaking shall be presumed feasible unless the agency proves that it is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address an unadopted agency statement.
- Subparagraph 120.54(1)(i)2. is created to provide that an agency rule that incorporates another rule of that agency automatically incorporates subsequent amendments to the referenced rule unless a contrary intent is indicated. A notice of amendments to a rule that has been incorporated by reference in other rules of the agency must explain the effect of those amendments on the referencing rules.

- Subparagraph 120.54(1)(i)3. is created to require that in rules adopted after December 31, 2010, material may not be incorporated by reference unless the material has been submitted in electronic format to the Department of State and the full text of the material can be made available for free public access. However, if the agency determines that electronic posting of the material would constitute a violation of federal copyright law, a notice to that effect along with the locations at which the material can be viewed shall be included in the notice of proposed rulemaking.
- Paragraph 120.54(1)(k) is created to provide that an agency head may delegate the initiation of rule development, but the approval of a rule prior to notice under 120.54(3)(a)1., the approval of a rule prior to filing for adoption under 120.54(3)(e)1., or the adoption of a rule not required to be filed with the Department of State under 120.54(3)(e)6., may not be delegated or transferred by the agency head.
- Subparagraph 120.54(3)(a)1. is amended to change the reference from “specific rulemaking authority” to “grant of rulemaking authority.”
- Subparagraph 120.54(3)(a)4. is amended to expressly require agencies to provide to the Joint Administrative Procedures Committee a copy of any material incorporated by reference in a rule.
- Subparagraph 120.54(3)(c)1. is amended to provide that Department of Professional Regulation boards and Department of Health boards must conduct at least one public hearing on a rule by the full board, and may not delegate this responsibility without the consent of the person requesting the hearing.
- Subparagraph 120.54(3)(e)1. is amended to expressly require approval of the agency head before a rule is filed for adoption. Also, the agency is expressly required to file with the Department of State one copy of any material incorporated by reference.
- Subparagraph 120.54(3)(e)2. is amended to provide that a rule may not be filed for adoption until 21 days after a statement of estimated regulatory costs has been provided to all persons who submitted a lower cost regulatory alternative and the statement has been made available to the public.
- Subparagraph 120.54(3)(e)4. is amended to require the Department of State to reject any rule that does not comply with all statutory rulemaking requirements and rules of the department.
- Subparagraph 120.54(4)(a)3. is amended to expressly require agencies to provide to the Joint Administrative Procedures Committee a copy of any material incorporated by reference in an emergency rule.
- Paragraph 120.54(7)(b) is amended to clarify that a petition to initiate rulemaking may be directed to an unadopted agency rule.

Section 120.545

- Paragraph 120.545(1)(j) is amended to require the Joint Administrative Procedures Committee to consider whether a rule’s statement of estimated regulatory costs complies with the requirements of s. 120.541.
- Existing subsections 120.545(2) through (10) are amended and renumbered as subsections (2) through (8) to simplify the language describing the process and

requirements when the Joint Administrative Procedures Committee votes to object to an agency rule.

Section 120.55

- Subparagraph 120.55(1)(a)1. is amended to change the reference from “specific rulemaking authority” to “grant of rulemaking authority,” and to require that rules in the Florida Administrative Code cite the specific law implemented pursuant to which each rule was adopted.
- Paragraph 120.55(1)(d) is amended to provide that the Department of State shall prescribe by rule the style and form required for rules, notices, and other materials submitted for filing.
- Subsection 120.55(5) is amended to require in the notice of proposed rulemaking the name of the agency head who approved the rule, and the date upon which the rule was approved.
- Effective July 1, 2010, paragraph 120.55(1)(a) is amended to require the Department of State to publish electronically the Florida Administrative Code, allow each rule chapter to be displayed in browse mode, and allow full text search. The department shall allow material incorporated by reference to be filed in electronic form and shall provide a hyperlink from the incorporating reference in the rule directly to the material.
- Effective July 1, 2010, subsection 120.55(2) is amended to require e-mail notification of selected notices to be sent out before or concurrently with weekly publication of the printed and electronic Florida Administrative Weekly, and to allow users to view incorporated materials submitted in electronic form.

Section 120.56

- Paragraph 120.56(2)(a) is amended to provide that a proposed rule challenge may be filed within 20 days after a statement of estimated regulatory costs has been provided to all persons who submitted a lower cost alternative and the statement is made available to the public.
- Paragraph 120.56(2)(b) is amended to clarify that after a petition for administrative determination has been filed, the agency may proceed with all other steps in the rulemaking process including the holding of a factfinding hearing.
- Effective January 1, 2009, subsection 120.56(4) is amended to provide that if the administrative law judge is notified before the final hearing in an unadopted rule challenge that the agency has published a notice of proposed rulemaking under s. 120.54(3), such notice shall operate as a stay of proceedings pending adoption of the statement as a rule. Other remedies in existing subparagraphs 120.56(4)(e)1. through 4. are deleted.

Section 120.569

- Subsection 120.569(1) is amended to require that if a disputed issue of material fact arises during a s. 120.57(2) proceeding, unless waived by all parties, that proceeding shall be terminated and a proceeding under s. 120.57(1) shall be conducted.

Section 120.57

- Effective January 1, 2009, paragraph 120.57(1)(e) is amended to provide that an agency or an administrative law judge may not base agency action that

determines substantial interests on an unadopted rule. This does not preclude the application of adopted rules and applicable law to the facts. However, if an agency demonstrates that it has not had time to adopt rules and has initiated the rulemaking process, the agency may rely on the unadopted rules, subject to de novo review by the administrative law judge.

Section 120.595

- Effective January 1, 2009, subsection 120.595(2) is amended to increase the cap on attorney's fees in proposed rule challenge proceedings to \$50,000, and to clarify that "court" refers to the appellate court.
- Effective January 1, 2009, subsection 120.595(3) is amended to increase the cap on attorney's fees in existing rule challenge and emergency rule challenge proceedings to \$50,000, and to clarify that "court" refers to the appellate court.
- Effective January 1, 2009, paragraph 120.595(4)(a) is amended to provide that if the appellate court or administrative law judge determines that an agency statement violates s. 120.54(1)(a), or that the agency must discontinue reliance on the statement pursuant to s. 120.56(4)(e), reasonable costs and attorney's fees shall be awarded to the petitioner unless the agency demonstrates that the statement is required by federal law.
- Effective January 1, 2009, paragraph 120.595(4)(b) is created to provide that upon notice to the administrative law judge that the agency has published a notice of rulemaking, such notice shall operate as a stay of proceedings pending rulemaking. The administrative law judge shall award attorney's fees and costs accrued by the petitioner prior to the date the notice was published, unless the agency proves that it did not know and should not have known that the statement was an unadopted rule. Fees and costs under paragraphs (a) and (b) shall be awarded only upon a finding that the agency received notice that the statement may constitute an unadopted rule at least 30 days before the unadopted rule challenge was filed, and the agency failed to publish the notice of rulemaking within the 30-day period. An award of attorney's fees may not exceed \$50,000.
- Effective January 1, 2009, paragraph 120.595(4)(d) is created to provide that if the agency prevails in the proceedings, attorney's fees and costs shall be awarded if it is determined that the party participated in the proceedings for an improper purpose, or that the party knew or should have known that the claim was not supported by material facts or would not be supported by the application of then-existing law to those facts.

Effective date: July 1, 2008, unless otherwise specified in the act.

Chapter 2008-149, Laws of Florida, amended subsection 120.54(3) to require an agency to prepare a statement of estimated regulatory costs of a proposed rule if the rule will have an impact on small business. References to the "small business ombudsman" have been replaced by reference to the "Small Business Regulatory Advisory Council." The Council is authorized to request the Senate President and House Speaker to direct the Office of Program Policy Analysis and Government

Accountability (OPPAGA) to determine whether regulatory alternatives rejected by the agency reduce the impact on small business and to report its findings to the Joint Administrative Procedures Committee. OPPAGA is directed to report its findings and recommendations to the Governor, Senate President and House Speaker. The Committee is directed to report such findings to the agency, and the agency is required to respond to the Committee and provide a written explanation if the agency does not adopt the regulatory alternatives. Section 120.74 is amended to require each agency in its biennial review of rules to determine whether the rules should be amended or repealed to reduce the impact on small business. In the required report, each agency must specifically address the economic impact of the rules on small business. Effective date: July 1, 2008.