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**ESSB 5034** - H AMD TO APP COMM AMD (H-2378.4/13) **388**

By Representative Taylor

**FAILED 04/12/2013**

On page 241, after line 18, insert the following:

"NEW SECTION**. Sec. 968**. (1) The legislature finds that Washington families, workers, and employers continue to struggle to make ends meet. As families and employers have streamlined their budgets and services, so should state government. Government continues to increase the burden on citizens and employers through perpetual alteration and expansion of rules. During 2012, an estimated 1,129 new sections to the Washington Administrative Code were permanently adopted, 2,211 sections were permanently amended, 393 emergency rule filings were made, and 961 sections were permanently repealed. A total of 5,511 pages of permanent rule changes were made and 2,398 pages of emergency rules were adopted. The constant changing of rules provides uncertainty to citizens and employers and adds additional costs to taxpayers as agencies hold public meetings and telephone conferences, and employees spend untold hours working on drafts for rules. Furthermore, continual proposal of new rules distracts employers from being productive in their respective enterprises due to a need to comment against these proposed rules. Most agencies do not track the number of hours employees spend on rule making nor do they track the cost to the agency to do this task. One way to reduce millions of dollars in employee and administrative costs is to impose a moratorium on formal and informal rule making by state agencies except in certain specified instances. This moratorium is to last for three years or until the state is no longer facing financial deficits.

(2) For state agencies provided appropriation authority under this act, no appropriations under this act shall be used for agency rule making during the 2013-15 biennium, except in the following cases:

(a) A rule is needed to implement a federal law and the rule is not more stringent than federal law;

(b) A rule is needed to implement the terms of a governor-declared state of emergency;

(c) A rule is needed by the department of health to respond to a public health emergency;

(d) A rule is needed to set the times for the taking of wildlife, fish, or shellfish pursuant to RCW 77.12.047(1) or 77.04.055(2); or

(e) Legislation enacted after January 1, 2013, specifically directs that rulemaking be undertaken. Rules adopted under this subsection (2)(e) during the 2013-15 biennium must be approved by the legislature in the ensuing legislative session before the rule may take effect.

(3) This section does not prohibit an agency from repealing rules.

NEW SECTION. **Sec. 969.** RCW 34.05.328 and 2011 c 298 s 21 and 2011 c 149 s 1 are each reenacted and amended to read as follows:

(1) Before adopting a rule described in subsection ((~~(5)~~)) (6) of this section, an agency must:

(a) Clearly state in detail the general goals and specific objectives of the statute that the rule implements;

(b) Determine that the rule is needed to achieve the general goals and specific objectives stated under (a) of this subsection, and analyze alternatives to rule making and the consequences of not adopting the rule;

(c) Provide notification in the notice of proposed rule making under RCW 34.05.320 that a preliminary cost-benefit analysis is available. The preliminary cost-benefit analysis must fulfill the requirements of the cost-benefit analysis under (d) of this subsection. If the agency files a supplemental notice under RCW 34.05.340, the supplemental notice must include notification that a revised preliminary cost-benefit analysis is available. A final cost-benefit analysis must be available when the rule is adopted under RCW 34.05.360;

(d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented;

(e) Determine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection;

(f) Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law;

(g) Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law;

(h) Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by the following:

(i) A state statute that explicitly allows the agency to differ from federal standards; or

(ii) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives stated under (a) of this subsection; ((~~and~~))

(i) Coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter; and  
 (j) For the 2013-15 biennium, receive the governor's signature on the final rule.

(2) In making its determinations pursuant to subsection (1)(a) through (h) of this section, the agency must place in the rule-making file documentation of sufficient quantity and quality so as to persuade a reasonable person that the determinations are justified.

(3) Before adopting rules described in subsection ((~~(5)~~)) (6) of this section, an agency must place in the rule-making file a rule implementation plan for rules filed under each adopting order. The plan must describe how the agency intends to:

(a) Implement and enforce the rule, including a description of the resources the agency intends to use;

(b) Inform and educate affected persons about the rule;

(c) Promote and assist voluntary compliance; and

(d) Evaluate whether the rule achieves the purpose for which it was adopted, including, to the maximum extent practicable, the use of interim milestones to assess progress and the use of objectively measurable outcomes.

(4) For the 2013-15 biennium, the adoption of rules described in subsection (5) of this section must be made before December 1st of any year, and the rules may not take effect before the end of the regular legislative session in the next year.  
 (5) After adopting a rule described in subsection ((~~(5)~~)) (6) of this section regulating the same activity or subject matter as another provision of federal or state law, an agency must do all of the following:

(a) Coordinate implementation and enforcement of the rule with the other federal and state entities regulating the same activity or subject matter by making every effort to do one or more of the following:

(i) Deferring to the other entity;

(ii) Designating a lead agency; or

(iii) Entering into an agreement with the other entities specifying how the agency and entities will coordinate implementation and enforcement.

If the agency is unable to comply with this subsection ((~~(4)~~)) (5)(a), the agency must report to the legislature pursuant to (b) of this subsection;

(b) Report to the joint administrative rules review committee:

(i) The existence of any overlap or duplication of other federal or state laws, any differences from federal law, and any known overlap, duplication, or conflict with local laws; and

(ii) Make recommendations for any legislation that may be necessary to eliminate or mitigate any adverse effects of such overlap, duplication, or difference.

((~~(5)~~)) (6)(a) Except as provided in (b) of this subsection, this section applies to:

(i) Significant legislative rules of the departments of ecology, labor and industries, health, revenue, social and health services, and natural resources, the employment security department, the forest practices board, the office of the insurance commissioner, and to the legislative rules of the department of fish and wildlife implementing chapter 77.55 RCW; and

(ii) Any rule of any agency, if this section is voluntarily made applicable to the rule by the agency, or is made applicable to the rule by a majority vote of the joint administrative rules review committee within forty-five days of receiving the notice of proposed rule making under RCW 34.05.320.

(b) This section does not apply to:

(i) Emergency rules adopted under RCW 34.05.350;

(ii) Rules relating only to internal governmental operations that are not subject to violation by a nongovernment party;

(iii) Rules adopting or incorporating by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule;

(iv) Rules that only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect;

(v) Rules the content of which is explicitly and specifically dictated by statute;

(vi) Rules that set or adjust fees under the authority of RCW 19.02.075 or that set or adjust fees or rates pursuant to legislative standards, including fees set or adjusted under the authority of RCW 19.80.045;

(vii) Rules of the department of social and health services relating only to client medical or financial eligibility and rules concerning liability for care of dependents; or

(viii) Rules of the department of revenue that adopt a uniform expiration date for reseller permits as authorized in RCW 82.32.780 and 82.32.783.

(c) For purposes of this subsection:

(i) A "procedural rule" is a rule that adopts, amends, or repeals (A) any procedure, practice, or requirement relating to any agency hearings; (B) any filing or related process requirement for making application to an agency for a license or permit; or (C) any policy statement pertaining to the consistent internal operations of an agency.

(ii) An "interpretive rule" is a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency's interpretation of statutory provisions it administers.

(iii) A "significant legislative rule" is a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.

(d) In the notice of proposed rule making under RCW 34.05.320, an agency must state whether this section applies to the proposed rule pursuant to (a)(i) of this subsection, or if the agency will apply this section voluntarily.

((~~(6)~~)) (7) By January 31, 1996, and by January 31st of each even- numbered year thereafter, the office of regulatory assistance, after consulting with state agencies, counties, and cities, and business, labor, and environmental organizations, must report to the governor and the legislature regarding the effects of this section on the regulatory system in this state. The report must document:

(a) The rules proposed to which this section applied and to the extent possible, how compliance with this section affected the substance of the rule, if any, that the agency ultimately adopted;

(b) The costs incurred by state agencies in complying with this section;

(c) Any legal action maintained based upon the alleged failure of any agency to comply with this section, the costs to the state of such action, and the result;

(d) The extent to which this section has adversely affected the capacity of agencies to fulfill their legislatively prescribed mission;

(e) The extent to which this section has improved the acceptability of state rules to those regulated; and

(f) Any other information considered by the office of financial management to be useful in evaluating the effect of this section.

NEW SECTION. **Sec. 970.** (1) The legislature finds that there have been instances where regulatory agencies discovered actions by a regulated entity that are in error after reports have been accepted and approved or inspections have been conducted and approved. Retroactively applying fines after governmental approval creates an unfriendly business environment and can place unexpected financial burdens on businesses. Businesses should be able to rely on government approval and acceptance of reports and inspections and not risk penalties when mistakes are made by government personnel or contractors. It is the intent of the legislature that regulated parties who have received acceptance and approval by the regulating government authority should not be subsequently fined or penalized, but should be encouraged to correct action that is deemed in error or violates reporting or inspection requirements during the next reporting period. The regulating authority should notify the regulated party of the violation to prevent future violations.

(2) For state agencies provided appropriation authority under this act, an agency may not issue a fine or impose a penalty on a person during the 2013-15 biennium if:

(a) An inspection is approved by an official of the agency requiring the inspection and a subsequent reevaluation of the approved inspection by the regulating agency identifies a violation by the regulated party; or

(b) Documentation required under an agency's reporting requirements is submitted to the agency by a regulated party and is accepted and approved by the regulating agency and a subsequent reevaluation of the approved documentation identifies a violation based on failure to provide required documentation or information.

(3) During the 2013-15 biennium, a rule may not authorize the imposition of a civil fine on a person based on the following circumstances if:

(a) An inspection is approved by an official of the agency requiring the inspection and a subsequent reevaluation of the approved inspection by the regulating agency identifies a violation by the regulated party; or

(b) Documentation required under an agency's reporting requirements is submitted to the agency by a regulated party and is accepted and approved by the regulating agency and a subsequent reevaluation of the approved documentation identifies a violation based on failure to provide required documentation or information.

(4) For the 2013-15 biennium, violations identified after an inspection or documentation has been approved may be remedied through technical assistance provided to the regulated party allowing correction of the circumstances of the violation for future reporting periods or inspections.

NEW SECTION**. Sec. 971**. After August 1, 2013 and until June 30, 2015, rules adopted by agencies must be based upon a specific grant of legislative authority for each rule as explicitly set forth in statute. Such rules must include the citation of the specific statutory sections from which the authority is derived, and may not be based solely upon the statute's intent or the general enabling statutes authorizing the activities of the agency.

NEW SECTION. **Sec. 972**. During the 2013-15 biennium, the State Parks and Recreation Commission, the Washington Department of Fish and Wildlife Commission, and the Department of Natural Resources are required to coordinate their respective agency land use plans with all applicable local government officials. The coordination of plans must occur in the plan development stage, along with the plan revision and implementation stages. At a minimum, all three agencies are required to keep apprised of all relevant local and tribal land use ordinances and plans, strive to ensure state policies and actions are consistent with local land use plans, assist in resolving inconsistencies between state and local land use policies, and provide meaningful public involvement, access to the agency director, and early notice of agency actions to local government officials. The agencies are required to report to the Legislature any instances that arise causing the agency to be incapable of compliance with local plans and ordinances because of conflicting statutory limitations or responsibilities.

NEW SECTION**. Sec. 973. (**1) During the 2013-15 biennium, agencies must provide to any business licensed to do business in the state of Washington a period of at least five business days to correct any violation of state law or agency rule before the agency may impose any fines, civil penalties, or administrative sanctions. If no correction is possible, this subsection does not apply.

(2) Exceptions to requirements of subsection (1) of this section may be made for any of the following reasons:

(a) The agency head determines that the effect of the violation or waiver presents a direct danger to the public health, poses a potentially significant threat to human health or safety, or causes serious harm to the public interest;

(b) The order is one to cease and desist an activity that violates a statute or rule protecting public health or safety, the environment, or would cause serious harm to the public interest;

(c) The violation involves a knowing or willful violation;

(d) The violation is of a requirement concerning the assessment, collection, or administration of any tax, tax program, debt, revenue, receipt, a regulated entity's financial filings, or insurance rate or form filing;

(e) The requirements in this section are in conflict with federal law or program requirements, federal requirements that are a prescribed condition to the allocation of federal funds to the state, or the requirements for eligibility of employers in this state for federal unemployment tax credits, as determined by the agency head;

(f) The business committing the violation previously violated the exact or substantially similar requirement; or

(g) The owner or operator of the business committing the violation owns or operates, or owned or operated a different business that previously violated a substantially similar requirement.

(3) This section does not prohibit an agency from waiving fines, civil penalties, or administrative sanctions incurred by a business for a violation.

(4) This section may be construed to diminish the responsibility for any citizen or business to apply for and obtain a permit, license, or authorizing document that is required to engage in a regulated activity, or otherwise comply with state or federal law.

(5) This section may not be construed to apply to businesses required to provide accurate and complete information and documentation in relation to any claim for payment of state or federal funds or who are licensed or certified to provide care and services to vulnerable adults or children.

(6) This section does not affect the attorney general's authority to impose fines, civil penalties, or administrative sanctions as otherwise authorized by law; nor does this section affect the attorney general's authority to enforce the consumer protection act, chapter 19.86 RCW."

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|  | EFFECT:   No appropriation made to a state agency may be used for agency rulemaking during the 2013-15 biennium except for rules needed to implement a federal law and the rule is not more stringent than federal law; rules necessary to implement the terms of a governor-declared state of emergency, rules needed by the Department of Health to respond to a public health emergency, or rules specifically required by legislation (which must sit through the next legislative session). The Governor's signature must be on any final rule adopted by an agency during the 2013-15 biennium.  During the 2013-15 biennium, an agency may not impose a fine or penalty retroactively if the agency first approves an inspection or document and then later finds a rule violation.  Between August 1, 2013 and June 30, 2015, rules adopted by agencies must be based on specific authority granted by the legislature and not on a statute's intent or general enabling statutes.  During the 2013-15 biennium, the State Parks and Recreation Commission, the Department of Fish and Wildlife, and the Department of Natural Resources must coordinate their agency land use plans with all applicable local land use officials.  During the 2013-15 biennium, agencies must provide a period of at least five days to Washington businesses to correct any violation of state law or agency rule before the agency may impose a fine, civil penalty, or administrative sanctions. This does not apply to cases related to public health and safety, a knowing or willful violation, a violation concerning taxes or revenues or insurance rate form filings, a violation of federal law, or multiple violations.  FISCAL IMPACT: No net change to appropriated levels. |

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