

Know the Rules

An Overview of State Agency Rulemaking



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Law & policy innovation for the common good.

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NATIONAL POLICY & LEGAL ANALYSIS NETWORK
TO PREVENT CHILDHOOD OBESITY

Contents



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Introduction



State laws have a significant impact on public health. Laws can be statutes, which are enacted by Legislatures, or rules (known as regulations in some states), which are adopted by state agencies and departments.¹ The development of rules is a public process, giving advocates the opportunity to influence their adoption.

This primer provides an overview of the formal rulemaking process at the state level and highlights opportunities for public input. While this primer outlines a general framework for state rulemaking, the actual procedures used in each state vary. Advocates should review their state's administrative rulemaking law for specific information on the process used in their state.



STATE AGENCY RULEMAKING & FUNDRAISING EXEMPTIONS

The U.S. Department of Agriculture's (USDA) Interim Final Rule, *Nutrition Standards for All Foods Sold in School*, published in June 2013, established minimum nutrition standards for "competitive foods" – all food sold to students outside of school lunch and breakfast programs. The USDA rule, which took effect on July 1, 2014, allows a special exemption for the sale of food or beverages that do not meet the nutrition standards for the purpose of conducting infrequent school-sponsored fundraisers. The rule authorizes the state agency responsible for administering the school lunch program to specify the number of exempt fundraisers allowed in schools in that state.²

Since the interim final rule was published, several state agencies have issued rules instituting the updated nutrition standards and setting the number of exempt fundraisers allowed in schools in their states. As the agencies went through the rulemaking process, local and state advocates on both sides of the debate commented on the proposed rules. Some recommended limiting the number of exempt fundraisers, arguing that these limits were necessary to establish a healthier school environment. Others proposed increasing the number of fundraisers because they felt schools needed the revenue generated by these events. The comment process allowed agencies to hear multiple perspectives on the issue.

Formal Rulemaking

States do not require every type of policy, procedure, or practice of an agency to undergo a formal rulemaking process. Common exceptions to the formal rulemaking process include intergovernmental, interagency, or intra-agency memoranda, directives, or communications that do not affect the rights of the public.⁸ Many states also exempt interpretive statements, guidelines, or other explanatory materials from formal rulemaking.⁹

Sometimes it can be hard to tell whether a particular agency action falls within one of the exceptions to rulemaking. Case law – court decisions issued when a person or entity challenges an agency action – helps to explain the exceptions in the statutes. A careful review of a state's statutory and case law is required to determine whether a particular agency action is subject to formal rulemaking.

SCHOOL WELLNESS COMMITTEES

The Massachusetts Legislature enacted a law authorizing the state department of public health, in consultation with the department of education, to enact rules governing school wellness committees.⁵ The public health department then adopted a rule that provided specific requirements of wellness committees, including how they can be established, membership requirements, meeting requirements, and duties of the committees.⁶ If the department decides to refine these details, it has the authority to amend the rule; it does not need to ask state legislators to amend the legislation.

State agencies adopt rules to:

- Fill in the details of legislation;³
- Implement, interpret, or set policy; and/or
- Establish practice or procedural requirements of the agency.⁴

State agencies engage in a formal rulemaking process to:



- Ensure all interested persons are aware of a proposed rule and its requirements so that they can comply with the rule;



- Allow affected parties and the general public an opportunity to express their views on the proposed rule;



- Gather information that can help staff to develop and implement the rule;



- Create an administrative record ensuring that if the rule is challenged in court, the court has the information necessary to make a decision;



- Allow a full and fair analysis of the impact and validity of a proposed rule; and



- Prevent secret rulemaking.⁷

The Rulemaking Process

State rulemaking usually involves several phases, including providing notice that the agency is considering adopting or amending a rule; taking public comment; and approving and adopting the final rule.

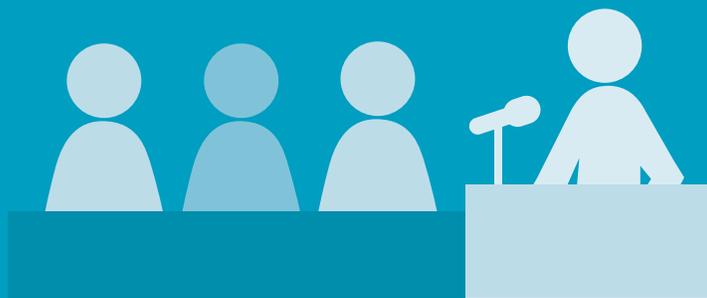
Notice to Public

STEP
1



Public Comment

STEP
2



Adoption of the Rule

STEP
3



STEP ONE

Notice to the Public

A state agency generally must provide notice to the public that it plans to adopt or amend a rule. Many states require an agency to send written notice to parties who have submitted written notification requests.¹⁰

Typically, the notice must contain a copy of the proposed rule; a summary or digest of the proposed rule; the law under which the rule is proposed; the date and time of any public hearing on the rule; and the procedure to submit comments on the proposed rule.¹¹ States may also require an agency to include a fiscal analysis of the costs or savings of the proposed rule to government as well as the estimated economic effect of the proposed rule on businesses to be regulated.¹²

The purpose of providing notice to the public is to make sure interested parties are aware of any proposed rule and invited to provide feedback.¹³ It allows the agency to receive comments, reactions, and additional information prior to finalizing a rule, particularly from those who will be affected by the rule.¹⁴

Tips for Advocates

Advocates can request notice of proposed rules from the agencies that oversee their areas of interest. They can also create “alert notices” to spread throughout their networks when agencies issue notices of proposed rules.



STEP TWO

Public Comment

After providing public notice, an agency must take written comments (sometimes electronically). Many also hold a public hearing to take oral comments before adopting a rule. In some states, such as California, if the agency does not schedule a public hearing on a proposed rule, an “interested person” may submit a written request for the agency to hold a public hearing, and the agency must do so.¹⁵ State laws usually require the agency to consider the comments before adopting a rule by including them in the administrative record.

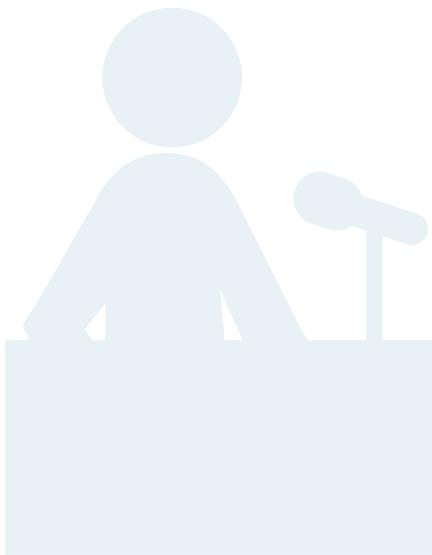
While in some situations an agency may specifically ask for comments on a particular part of a rule, generally members of the public are able to comment on any aspect of a rule. The public can support positive aspects of a rule, criticize all or part of a rule, provide valuable information on the subject area of a rule, or highlight potential negative outcomes or effects.

Tips for Advocates

The public comment period is the opportunity to shape the final rule. Advocates should work together to review and evaluate the proposed rule and develop a model comment expressing their views. They should circulate the model among their networks, and ask those in the network to submit comments. If they have time, individual organizations can tailor model comments to ensure their unique perspective comes through.

Advocates and stakeholders are more likely to affect the final rule if a large number of community members submit similar comments. For that reason, it’s important for advocates to submit comments – even when they are in agreement with the rule – in order to counter any negative comments the agency might receive.

Advocates can also attend the public hearings on a proposed rule and give oral comments. Public advocacy at a hearing is often very effective. More resources for advocates are available at the [American Heart Association’s Voices for Healthy Kids website](#).



PUBLIC COMMENT & LOBBYING

Nonprofit organizations that receive their nonprofit status under 501(c)(3) may submit comments to state agencies on proposed rules without jeopardizing their nonprofit status; under federal law, this activity does not constitute lobbying.¹⁶ For more information about lobbying, visit the [Alliance for Justice’s website](#).

STEP THREE

Adoption of the Rule

Once an agency has taken public comment, it generally must take one of three actions: approve the rule; terminate the rulemaking process; or, if state law allows, extend the period for rulemaking.¹⁷ The final process required to formally adopt a rule is different in each state. Advocates should become familiar with the process in their state.

In many states, the agency must submit its rule to a particular independent commission or the legislature for review and approval before the rule is finally adopted.¹⁸ The reviewing body either approves the rule and transmits it for filing, or disapproves it within a specified number of days following submission. In some states, if the reviewing body fails to act within the specified timeframe, the rule is considered to be approved. If the regulation is disapproved, it is returned to the agency with a statement of reasons for the disapproval. Under certain conditions, the agency may rewrite and resubmit the regulation.¹⁹ State law may also require that legislative counsel review and approve the rule before it is considered to be adopted.²⁰

Generally, adopted rules are filed with a state entity, such as the Secretary of State, and eventually published in a register and placed into the state's administrative code.²¹ State law establishes when an adopted rule is effective.²²

Tips for Advocates

Advocates should follow the rulemaking process, noting to whom the rule is referred and tracking the rule's status in the review process. Should additional information be necessary, advocates can offer to educate those reviewing the rule. Advocates can use action alerts or comments to mobilize grassroots support. Convening a group of community members to educate the reviewing body can ensure that the rule is fairly and accurately interpreting the intent of the law or regulation, and that no stakeholders are negatively impacted.

Once a final rule has been issued, advocates should analyze how the rule might affect their stakeholders, and prepare for implementation. Advocates should also consider any technical assistance their stakeholders might need and prepare accordingly.

Changing or Challenging a Rule



An adopted rule may be changed through several advocacy channels, including by petition to the agency or a challenge in court.

Many states allow any “interested person” to petition a state agency to adopt, amend, or repeal a rule.²³ Generally, once an agency receives a petition, it must either issue a written denial explaining the reasons for the denial, or initiate rulemaking procedures. Allowing petitions for rule changes recognizes that rules and policies may need to be adapted to meet changing circumstances.²⁴

Rules can also be challenged in court. A state’s constitution, as well as its statutory and case law, determines how a rule can be challenged.

One type of challenge is on procedural grounds. Agencies must adopt rules in accordance with the state laws governing rulemaking. An agency’s failure to follow those procedures may invalidate the rule.²⁵ Generally, however, the agency must demonstrate only “substantial” compliance; in other words, it doesn’t have to show it followed the procedures perfectly.²⁶ And in some jurisdictions, such as Georgia and Texas, there is only a limited time period (two years in those states) in which to allege that a rule is invalid on this basis.²⁷

For example, in *Naturist Action Committee v. California State Dept. of Parks & Recreation*,²⁸ the Naturist Action Committee challenged the department’s action to prohibit nude sunbathing at a particular beach. The plaintiffs argued that the department did not follow the administrative rulemaking process when changing the policy on nude sunbathing, rendering the change invalid.²⁹ The court agreed with the plaintiffs, but held that the original policy, which permitted nude sunbathing, should have been instituted by formal rulemaking procedures as well. The court banned nude sunbathing, determining that the department’s action amounted to discontinuing a policy that was invalid to begin with.³⁰

Another court challenge is on the grounds that the rule is inconsistent with or exceeds the statute that the rule is supposed to implement.³¹ An administrative rule exceeds its statutory authority if it conflicts with the language of the statute or the legislative intent of the statute.³²

In *Georgia Dept. of Community Health v. Dillard*,³³ for example, the court struck down a regulation because it exceeded the authorizing statute. The statute expressly gave state employees the right to request a hearing before an administrative law judge when appealing terminations of employment.³⁴ But the regulation allowed the administrative law judge to decide the appeal without holding a hearing. The court found that because the statute expressly allowed the employee to request a hearing and the regulation did not, the regulation was contrary to the law.³⁵

Finally, a third type of court challenge is that a rule is “arbitrary and capricious” or unreasonable.³⁶ Generally, a rule is found to be reasonable as long as it is directed toward carrying out or implementing the goals of the statute.³⁷

Conclusion



When state agencies develop and adopt rules that affect the public’s health, advocates have a variety of opportunities to influence that policy. By understanding the rulemaking process, advocates can ensure their voices are heard.

Endnotes



1. For simplicity, this fact sheet uses the term “rule” to refer to rules or regulations.
2. 7 C.F.R. §210.11(b)(4).
3. 73 C.J.S. Public Administrative Law and Procedure § 207.
4. 73 C.J.S. Public Administrative Law and Procedure § 212.
5. Mass. Gen. Laws Ann. § 223(f).
6. 105 Mass. Admin. Code § 215.100.
7. 2 Am. Jur. 2d Administrative Law § 184.
8. 73 C.J.S. Public Administrative Law and Procedure § 213.
9. *Id.* See also Utah. Code. Ann. 1953 § 63G-3-201. Other common exceptions include matters relating to legal or Attorney General rulings; rules relating to contracts or commercial negotiations; rules relating to the establishment or rates, prices, or tariffs; and rules relating to the use or creation of signs or symbols used on roadways.
10. See, e.g., Cal. Govt. Code § 11346.4; Georgia Code Ann. § 50-13-4.
11. 73 C.J.S. Public Administrative Law and Procedure § 231.
12. See, e.g., Cal. Govt. Code § 11346.5; Nev. Rev. Stat. § 233B.0603; Tex. Code Ann. Govt. § 2001.023.
13. 2 Am. Jur. 2d Administrative Law § 184.
14. 73 C.J.S. Public Administrative Law and Procedure § 231.
15. Cal. Govt. Code § 11346.8; see also, Tex. Code Ann. Govt. § 2001.029 (requiring Texas agencies to hold a public hearing if requested by 25 persons, a governmental agency, or an association having at least 25 members).
16. 26 CFR 56.4911-2(b)(1). As the Internal Revenue Service states on its website: www.irs.gov/Charities-&Non-Profits/Lobbying
In general, no organization may qualify for section 501(c)(3) status if a substantial part of its activities is attempting to influence legislation (commonly known as *lobbying*). A 501(c)(3) organization may engage in some lobbying, but too much lobbying activity risks loss of tax-exempt status. *Legislation* includes action by Congress, any state legislature, any local council, or similar governing body, with respect to acts, bills, resolutions, or similar items (such as legislative confirmation of appointive office), or by the public in referendum, ballot initiative, constitutional amendment, or similar procedure. *It does not include actions by executive, judicial, or administrative bodies. (emphasis added)*
17. 2 Am. Jur. 2d Administrative Law § 194.
18. 73 C.J.S. Public Administrative Law and Procedure § 242.
19. 73 C.J.S. Public Administrative Law and Procedure § 242.
20. See, e.g., 18 Nev. Stat. § 233B.064.
21. 2 Am. Jur. 2d Administrative Law § 198; Ga. Code Ann. § 50-13-6.
22. 2 Am. Jur. 2d Administrative Law s 200.
23. 2 Am. Jur. 2d Administrative Law § 213.
24. 2 Am. Jur. 2d Administrative Law § 207.
25. 2 Am. Jur. 2d Administrative Law § 214.
26. 2 Am. Jur. 2d Administrative Law § 185.
27. Ga. Code Ann. § 50-13-9, Tex. Code Ann. Govt. § 2001.035.
28. 175 Cal.App.4th 1244 (2009).
29. *Id.* at 1247-1248.
30. *Id.* at 1249.
31. 2 Am. Jur. 2d Administrative Law § 216.
32. *Id.*
33. 313 Ga.App. 782, 723 S.E.2d 23 (2012).
34. *Id.* at 784.
35. *Id.* at 786.
36. 2 Am. Jur. 2d Administrative Law § 219.
37. *Id.*



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