



RULEMAKING 101

Rulemaking is the process that governmental bodies must go through to promulgate rules. In Indiana, the process is governed by the Administrative Rules and Procedures Act (ARPA). See Ind. Code 4-22-2.

WHAT IS A RULE?

A rule is defined in Ind. Code § 4-22-2-3(b), and is an agency statement of general applicability that:

- (1) has the effect of law; and
- (2) implements, interprets, or prescribes:
 - (a) law or policy; or
 - (b) the organization, procedure, or practice requirements of an agency.

In general, a rule must apply generally and regulate prospectively (not retrospectively as in the case of orders). Rules are created by agencies. Statutes are created by the legislature.

WHEN CAN AN AGENCY DRAFT A RULE?

In order to engage in rulemaking, the agency must have rulemaking authority. This authority to make rules comes from the agency's enabling statute. An agency's enabling statute may explicitly grant rulemaking authority or this power may be implied.

WHAT IS THE SCOPE OF THE AGENCY'S RULEMAKING AUTHORITY?

An agency's power to promulgate rules is limited to that which is prescribed in statute. An agency may not exceed its statutory authority and any rules that exceed the agency's authority are invalid and unenforceable. Additionally, rules that conflict with statute are invalid and unenforceable (i.e. statutes trump rules).

Once it is determined that an agency has rulemaking authority, the agency may begin the rulemaking process.

BUT DON'T FORGET ABOUT THE RULEMAKING MORATORIUM.

Initially, it should be noted that the state of Indiana has a rulemaking moratorium in place. See Executive Order 13-03. However, there are exceptions to the moratorium that allow certain categories of rules to be promulgated. These categories of rules are:

- a. rules to fulfill an objective related to job creation and increasing investment in Indiana or to improve the quality of Indiana's workforce;
- b. rules that repeal existing rules or reduce their regulatory impact;
- c. rules that implement a federal mandate and no waiver is permitted;

- d. rules necessary to avoid a violation of a court order or federal law that would result in sanctions by a court or the federal government against the state for failure to conduct the rulemaking action;
- e. rules to address matters pertaining to the control, mitigation or eradication of waste, fraud or abuse within a state agency or wasteful or abusive activities perpetrated against a state agency;
- f. rules that reduce State spending; or
- g. rules whose predominate purpose and effect are to address matters of emergency or health or safety, including the promulgation of an emergency rule under Ind. Code §4-22-2-37.1.

If a proposed rule does not fall within one of these categories, the proposed rule cannot be promulgated. However, if an agency believes one of these exceptions applies, then the agency shall contact the Office of Management and Budget (“OMB”) to obtain a determination on whether they may proceed with the rulemaking action. The request for a determination if an exception to the moratorium applies must be made to OMB following the requirements of Financial Management Circular 2015-1 which requires the agency to submit, among other things, a copy of the proposed rule, a fiscal impact analysis, a cost benefit analysis, a history and background of the rule, and the reason for the proposed rule.

DRAFTING RULES

The first step in the rulemaking process is to begin drafting a proposed rule. This can be done in multiple ways (e.g. a committee could be appointed to draft a rule from scratch; a model code may be adopted; an interested party may submit a draft rule to be adopted by the agency; or the agency could chose to draft the rule itself). However, no matter how the language of the proposed rule is created, the final rule must be adopted by the body that has the statutory authority to promulgate the rule.

In drafting a proposed rule, the drafting body should always have in the back of their mind that these rules should:

- (1) Minimize the expenses to:
 - (A) regulated entities that are required to comply with the rule;
 - (B) persons who pay taxes or pay fees for government services affected by the rule; and
 - (C) consumers of products and services of regulated entities affected by the rule.
- (2) Achieve the regulatory goal in the least restrictive manner.
- (3) Avoid duplicating standards found in state or federal laws.
- (4) Be written for ease of comprehension.
- (5) Have practicable enforcement.

See Ind. Code § 4-22-2-19.5.

The rule should also be clear, concise, and easy to interpret and apply. See Ind. Code § 4-22-2-20.

CALCULATING FISCAL AND ECONOMIC IMPACT

Another item that must be considered when drafting rules is the fiscal and economic impact the rule will have upon governmental entities and the regulated public. Without having these calculations, the rulemaking action will not be able to advance through the moratorium or the legal adoption process.

Therefore, the drafting body should be calculating the fiscal and economic impact the proposed rule will create at the same time the rule is being drafted.

This calculation is to determine the annual monetary impact the rule will produce in the first twelve (12) months after the rule is fully implemented (after any phase in periods). The fiscal and economic impact is calculated by estimating the difference between the new regulatory framework provided for in the proposed rule and the current regulatory framework (if there is one). This calculation must also take into account: (1) the impact of the rule on regulated persons that already would be in compliance with the new standards imposed by the rule on a voluntary basis; and (2) any cost savings the rule would produce.

Additionally, a statement of need and a cost-benefit analysis should be performed. The body should also examine alternatives that could be implemented to achieve their goals outside of the rulemaking process, or whether a less restrictive rule could be used instead. See FMC 2010-4. These tasks should be undertaken with the goal of addressing the following questions: what is the purpose of the rule and how will this rule achieve this purpose (keeping in mind the requirements of Ind. Code § 4-22-2-19.5 and Ind. Code § 4-22-2-20).

THE LEGAL PROCESS THAT FOLLOWS

The drafting of the proposed rule is not the end of the process; this is just the beginning. The following steps must also be completed prior to a rule becoming effective:

- * An exception to the rulemaking moratorium must be requested (and obtained) by submitting the proposed rule, fiscal and economic impact statement, and cost-benefit analysis to OMB for review.
- 1. A notice of intent to adopt a rule must be published in the Indiana Register.
- 2. A fiscal impact and cost benefit analysis must be submitted to the State Budget Agency (“SBA”) who must approve the rule to move forward.
- 3. After obtaining approval from the SBA, and at least 28 days following the publication of the notice of intent, a public notice must be posted by the Indiana Register and published in a newspaper informing the public that a public hearing will be held regarding the proposed rule.
- 4. After notice is given, a public hearing must be held on the rule for the agency to receive and consider comments on the proposed rule.
- 5. After the comments are considered, the agency then may make changes to the rule or adopt a final rule.
- 6. The final rule is then submitted to the Attorney General for review and approval.
- 7. After the Attorney General approves the rule, the Governor must approve the rule.
- 8. After the Governor approves the rule, the rule is published by the Indiana Register and becomes effective.