

# D R A F T

## SUMMARY

Requires state agencies to provide summary of legal advice regarding validity or effect of proposed rule or written order.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

Relating to legal advice provided to state agencies; creating new provisions; amending ORS 183.335; and declaring an emergency.

### **Be It Enacted by the People of the State of Oregon:**

**SECTION 1.** ORS 183.335 is amended to read:

183.335. (1) Prior to the adoption, amendment or repeal of any rule, the agency shall give notice of its intended action:

(a) In the manner established by rule adopted by the agency under ORS 183.341 (4), which provides a reasonable opportunity for interested persons to be notified of the agency's proposed action;

(b) In the bulletin referred to in ORS 183.360 at least 21 days prior to the effective date;

(c) At least 28 days before the effective date, to persons who have requested notice pursuant to subsection (8) of this section; and

(d) Delivered only by electronic mail, at least 49 days before the effective date, to the persons specified in subsection (15) of this section.

(2)(a) The notice required by subsection (1) of this section must include:

(A) A caption of not more than 15 words that reasonably identifies the subject matter of the agency's intended action. The agency shall include the caption on each separate notice, statement, certificate or other similar doc-

ument related to the intended action.

(B) An objective, simple and understandable statement summarizing the subject matter and purpose of the intended action in sufficient detail to inform a person that the person's interests may be affected, and the time, place and manner in which interested persons may present their views on the intended action.

(b) The agency shall include with the notice of intended action given under subsection (1) of this section:

(A) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule;

(B) A citation of the statute or other law the rule is intended to implement;

(C) A statement of the need for the rule and a statement of how the rule is intended to meet the need;

(D) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection. The list may be abbreviated if necessary, and if so abbreviated there shall be identified the location of a complete list;

(E) A statement of fiscal impact identifying state agencies, units of local government and the public that may be economically affected by the adoption, amendment or repeal of the rule and an estimate of that economic impact on state agencies, units of local government and the public. In considering the economic effect of the proposed action on the public, the agency shall utilize available information to project any significant economic effect of that action on businesses which shall include a cost of compliance effect on small businesses affected. For an agency specified in ORS 183.530, the statement of fiscal impact shall also include a housing cost impact statement as described in ORS 183.534;

**(F) A summary of any legal advice received by the agency regarding the validity or effect of the rule;**

1     ~~[(F)]~~ **(G)** If an advisory committee is not appointed under the provisions  
 2 of ORS 183.333, an explanation as to why no advisory committee was used  
 3 to assist the agency in drafting the rule; and

4     ~~[(G)]~~ **(H)** A request for public comment on whether other options should  
 5 be considered for achieving the rule's substantive goals while reducing the  
 6 negative economic impact of the rule on business.

7     (c) The Secretary of State may omit the information submitted under  
 8 paragraph (b) of this subsection from publication in the bulletin referred to  
 9 in ORS 183.360.

10    (d) When providing notice of an intended action under subsection (1)(c)  
 11 of this section, the agency shall provide a copy of the rule that the agency  
 12 proposes to adopt, amend or repeal, or an explanation of how the person may  
 13 acquire a copy of the rule. The copy of an amended rule shall show all  
 14 changes to the rule by striking through material to be deleted and under-  
 15 lining all new material, or by any other method that clearly shows all new  
 16 and deleted material.

17    (3)(a) When an agency proposes to adopt, amend or repeal a rule, it shall  
 18 give interested persons reasonable opportunity to submit data or views. Op-  
 19 portunity for oral hearing shall be granted upon request received from 10  
 20 persons or from an association having not less than 10 members before the  
 21 earliest date that the rule could become effective after the giving of notice  
 22 pursuant to subsection (1) of this section. An agency holding a hearing upon  
 23 a request made under this subsection shall give notice of the hearing at least  
 24 21 days before the hearing to the person who has requested the hearing, to  
 25 persons who have requested notice pursuant to subsection (8) of this section  
 26 and to the persons specified in subsection (15) of this section. The agency  
 27 shall publish notice of the hearing in the bulletin referred to in ORS 183.360  
 28 at least 14 days before the hearing. The agency shall consider fully any  
 29 written or oral submission.

30    (b) If an agency is required to conduct an oral hearing under paragraph  
 31 (a) of this subsection, and the rule for which the hearing is to be conducted

1 applies only to a limited geographical area within this state, or affects only  
2 a limited geographical area within this state, the hearing shall be conducted  
3 within the geographical area at the place most convenient for the majority  
4 of the residents within the geographical area. At least 14 days before a  
5 hearing conducted under this paragraph, the agency shall publish notice of  
6 the hearing in the bulletin referred to in ORS 183.360 and in a newspaper  
7 of general circulation published within the geographical area that is affected  
8 by the rule or to which the rule applies. If a newspaper of general circulation  
9 is not published within the geographical area that is affected by the rule or  
10 to which the rule applies, the publication shall be made in the newspaper  
11 of general circulation published closest to the geographical area.

12 (c) Notwithstanding paragraph (a) of this subsection, the Department of  
13 Corrections and the State Board of Parole and Post-Prison Supervision may  
14 adopt rules limiting participation by inmates in the proposed adoption,  
15 amendment or repeal of any rule to written submissions.

16 (d) If requested by at least five persons before the earliest date that the  
17 rule could become effective after the agency gives notice pursuant to sub-  
18 section (1) of this section, the agency shall provide a statement that identi-  
19 fies the objective of the rule and a statement of how the agency will  
20 subsequently determine whether the rule is in fact accomplishing that ob-  
21 jective.

22 (e) An agency that receives data or views concerning proposed rules from  
23 interested persons shall maintain a record of the data or views submitted.  
24 The record shall contain:

25 (A) All written materials submitted to an agency in response to a notice  
26 of intent to adopt, amend or repeal a rule.

27 (B) A recording or summary of oral submissions received at hearings held  
28 for the purpose of receiving those submissions.

29 (C) Any public comment received in response to the request made under  
30 subsection [(2)(b)(G)] **(2)(b)(H)** of this section and the agency's response to  
31 that comment.

(D) Any statements provided by the agency under paragraph (d) of this subsection.

(4) Upon request of an interested person received before the earliest date that the rule could become effective after the giving of notice pursuant to subsection (1) of this section, the agency shall postpone the date of its intended action no less than 21 nor more than 90 days in order to allow the requesting person an opportunity to submit data, views or arguments concerning the proposed action. Nothing in this subsection shall preclude an agency from adopting a temporary rule pursuant to subsection (5) of this section.

(5) Notwithstanding subsections (1) to (4) of this section, an agency may adopt, amend or suspend a rule without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, if the agency prepares:

(a) A statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice;

(b) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule;

(c) A statement of the need for the rule and a statement of how the rule is intended to meet the need;

(d) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection; and

(e) For an agency specified in ORS 183.530, a housing cost impact statement as defined in ORS 183.534.

(6)(a) A rule adopted, amended or suspended under subsection (5) of this section is temporary and may be effective for a period of not longer than 180 days. The adoption of a rule under this subsection does not preclude the subsequent adoption of an identical rule under subsections (1) to (4) of this

1 section.

2 (b) A rule temporarily suspended shall regain effectiveness upon expira-  
3 tion of the temporary period of suspension unless the rule is repealed under  
4 subsections (1) to (4) of this section.

5 (7) Notwithstanding subsections (1) to (4) of this section, an agency may  
6 amend a rule without prior notice or hearing if the amendment is solely for  
7 the purpose of:

8 (a) Changing the name of an agency by reason of a name change pre-  
9 scribed by law;

10 (b) Changing the name of a program, office or division within an agency  
11 as long as the change in name does not have a substantive effect on the  
12 functions of the program, office or division;

13 (c) Correcting spelling;

14 (d) Correcting grammatical mistakes in a manner that does not alter the  
15 scope, application or meaning of the rule;

16 (e) Correcting statutory or rule references; or

17 (f) Correcting addresses or telephone numbers referred to in the rules.

18 (8)(a) Any person may request in writing that an agency send to the per-  
19 son copies of the agency's notices of intended action issued under subsection  
20 (1) of this section. The person must provide an address where the person  
21 elects to receive notices. The address provided may be a postal mailing ad-  
22 dress or, if the agency provides notice by electronic mail, may be an elec-  
23 tronic mailing address.

24 (b) A request under this subsection must indicate that the person requests  
25 one of the following:

26 (A) The person may request that the agency mail paper copies of the  
27 proposed rule and other information required by subsection (2) of this section  
28 to the postal mailing address.

29 (B) If the agency posts notices of intended action on a website, the person  
30 may request that the agency mail the information required by subsection  
31 (2)(a) of this section to the postal mailing address with a reference to the

1 website where electronic copies of the proposed rule and other information  
2 required by subsection (2) of this section are posted.

3 (C) The person may request that the agency electronically mail the in-  
4 formation required by subsection (2)(a) of this section to the electronic  
5 mailing address, and either provide electronic copies of the proposed rule and  
6 other information required by subsection (2) of this section or provide a  
7 reference to a website where electronic copies of the proposed rule and other  
8 information required by subsection (2) of this section are posted.

9 (c) Upon receipt of any request under this subsection, the agency shall  
10 acknowledge the request, establish a mailing list and maintain a record of  
11 all mailings made pursuant to the request. Agencies may establish proce-  
12 dures for establishing the mailing lists and keeping the mailing lists current.  
13 Agencies by rule may establish fees necessary to defray the costs of mailings  
14 and maintenance of the lists.

15 (d) Members of the Legislative Assembly who receive notices under sub-  
16 section (15) of this section may request that an agency furnish paper copies  
17 of the notices.

18 (9) This section does not apply to rules establishing an effective date for  
19 a previously effective rule or establishing a period during which a provision  
20 of a previously effective rule will apply.

21 (10) This section does not apply to ORS 279.835 to 279.855, 279A.140 to  
22 279A.161, 279A.250 to 279A.290, 279A.990, 279B.050 to 279B.085, 279B.200 to  
23 279B.240, 279B.270, 279B.275, 279B.280, 279C.360, 279C.365, 279C.370, 279C.375,  
24 279C.380, 279C.385, 279C.500 to 279C.530, 279C.540, 279C.545, 279C.550 to  
25 279C.570, 279C.580, 279C.585, 279C.590, 279C.600 to 279C.625, 279C.650 to  
26 279C.670 and 279C.800 to 279C.870 relating to public contracts and purchas-  
27 ing.

28 (11)(a) Except as provided in paragraph (c) of this subsection, a rule is  
29 not valid unless adopted in substantial compliance with the provisions of this  
30 section in effect on the date that the notice required under subsection (1)  
31 of this section is delivered to the Secretary of State for the purpose of pub-

lication in the bulletin referred to in ORS 183.360.

(b) In addition to all other requirements with which rule adoptions must comply, a rule is not valid if the rule has not been submitted to the Legislative Counsel in the manner required by ORS 183.715.

(c) A rule is not subject to judicial review or other challenge by reason of failing to comply with subsection (2)(a)(A) of this section.

(12)(a) Notwithstanding the provisions of subsection (11) of this section, but subject to paragraph (b) of this subsection, an agency may correct its failure to substantially comply with the requirements of subsections (2) and (5) of this section in adoption of a rule by an amended filing, as long as the noncompliance did not substantially prejudice the interests of persons to be affected by the rule.

(b) An agency may use an amended filing to correct a failure to include a fiscal impact statement in a notice of intended action, as required by subsection (2)(b)(E) of this section, or to correct an inaccurate fiscal impact statement, only if the agency developed the fiscal impact statement with the assistance of an advisory committee or fiscal impact advisory committee appointed under ORS 183.333.

(13) Unless otherwise provided by statute, the adoption, amendment or repeal of a rule by an agency need not be based upon or supported by an evidentiary record.

(14) When an agency has established a deadline for comment on a proposed rule under the provisions of subsection (3)(a) of this section, the agency may not extend that deadline for another agency or person unless the extension applies equally to all interested agencies and persons. An agency shall not consider any submission made by another agency after the final deadline has passed.

(15) The notices required under subsections (1) and (3) of this section must be given by the agency to the following persons:

(a) If the proposed adoption, amendment or repeal results from legislation that was passed within two years before notice is given under subsection (1)



of this section, notice shall be given to the legislator who introduced the bill that subsequently was enacted into law, and to the chair or cochair of all committees that reported the bill out, except for those committees whose sole action on the bill was referral to another committee.

(b) If the proposed adoption, amendment or repeal does not result from legislation that was passed within two years before notice is given under subsection (1) of this section, notice shall be given to the chair or cochair of any interim or session committee with authority over the subject matter of the rule.

(c) If notice cannot be given under paragraph (a) or (b) of this subsection, notice shall be given to the Speaker of the House of Representatives and to the President of the Senate who are in office on the date the notice is given.

(16)(a) Upon the request of a member of the Legislative Assembly or of a person who would be affected by a proposed adoption, amendment or repeal, the committees receiving notice under subsection (15) of this section shall review the proposed adoption, amendment or repeal for compliance with the legislation from which the proposed adoption, amendment or repeal results.

(b) The committees shall submit their comments on the proposed adoption, amendment or repeal to the agency proposing the adoption, amendment or repeal.

**SECTION 2. Section 3 of this 2016 Act is added to and made a part of ORS chapter 183.**

**SECTION 3. An order expressed in writing by an agency must include a summary of any legal advice received by the agency regarding the validity or effect of the order.**

**SECTION 4. (1) The amendments to ORS 183.335 by section 1 of this 2016 Act apply only to notices of intended action given on or after the effective date of this 2016 Act.**

**(2) Section 3 of this 2016 Act applies only to orders issued on or after the effective date of this 2016 Act.**

1     **SECTION 5. This 2016 Act being necessary for the immediate pres-**  
2     **ervation of the public peace, health and safety, an emergency is de-**  
3     **clared to exist, and this 2016 Act takes effect on its passage.**

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