

SB 6396 would bring review and accountability to agency rule-making

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Key Findings

1. In 2015, state agencies filed 1,535 new rules that fill 15,727 pages. They adopted 1,046 of those rules, filling 9,147 pages and changing 5,305 sections of the Washington Administrative Code.
2. In addition to the sheer volume of rules adopted by state agencies is the problem of imposing regulation without public accountability or representation.
3. SB 6396 would require state agencies to submit all proposed new rules or amendments to existing rules to the Attorney General for an opinion as to its constitutionality and legality.
4. Additionally, SB 6396 would establish a yearly expiration date for all agency rules, unless the Legislature passes legislation to postpone the expiration. If a rule expires, the agency could not re-impose the rule unless expressly authorized by statute.
5. SB 6396 would serve the public interest because it would ensure state agencies do not overstep their authority and would assure the public and lawmakers that agency rules are legal and constitutional.
6. The bill could also slow the pace at which new rules proliferate. If agency officials know the Attorney General must confirm the legality of proposed rules before they are adopted, and that the Legislature will have the final say on whether a rule remains in force, they will be less likely to adopt illegal or overreaching rules in the first place.
7. SB 6396 is a common-sense solution to a very serious problem. It would instill accountability into the rulemaking process by preventing unelected agency officials and lawmakers from unilaterally imposing regulations with no concern for the consequences. The result would be increased public accountability and a much-needed check and balance system on agency rulemaking activity.

Introduction

This Legislative Memo provides an overview and analysis of SB 6396. The bill would help alleviate the growing problem of unelected officials at state agencies imposing new rules and regulations without legislative oversight.

SB 6396 would ensure new agency rules are confirmed to be legal and constitutional by the state Attorney General, and ensure the elected Legislature has the final say on new regulations. The bill would require that a proposed new rule, or a change to an existing rule, be submitted to the state Attorney General for an opinion on its legality and constitutionality before it

is adopted. In addition, any new rule adopted or amended by a state agency would have to receive approval by the Legislature within a year or the rule would expire.

WPC has proposed a series of long-standing policy recommendations to reduce the regulatory burden state officials impose on people. These include requiring the governor to review and approve new agency regulations; reviewing regulations to identify those that are outdated, duplicate or which contradict each other, including a regulatory sunset provision for new regulations; and submitting all existing regulations to review by the legislature every five years.¹

SB 6396 includes variations of these recommendations. Based on WPC's research and analysis, passage of SB 6396 would be an important step toward establishing a much-needed check on over-zealous agency rulemaking activity.

Background

Washington is considered one of the most heavily regulated states in the nation. A recent study by the Pacific Research Institute ranks Washington the 8th most regulated state.² Another study by the Mercatus Center at George Mason University, using different measures, ranks Washington as the

13th most regulated.³ Both rankings demonstrate a regulatory environment in urgent need of reform.

Business owners large and small agree. They increasingly identify Washington's regulatory burden as the major obstacle to business and job growth.

An annual survey by Chief Executive Group of more than 500 CEOs consistently ranks Washington among the worst states in which to do business because of the state's "unfriendly tax and regulatory policies."⁴ As noted in its most recent survey:

*"Washington's regulatory environment can stifle outside investment in new facilities."*⁵

An annual survey by Thumbtack, an Internet marketplace, reveal small business owners in Washington grade this state a dismal C- when it comes to regulations in general, with a D+ grade for the state's employment, labor and hiring restrictions.⁶

Highlighting the importance of a state's regulatory system, the 18,000 business owners participating in the Thumbtack survey said a state's regulatory burden and ease of compliance with those regulations was a more important factor than tax rates in determining a state's overall friendliness to small businesses.

Even state agencies acknowledge the regulatory problem in Washington.

1 "Policy Guide for Washington State, 4th Edition," Paul Guppy, editor, Washington Policy Center, 2012, at www.washingtonpolicy.org/library/doclib/Policy-Guide-2012-ch6.pdf.

2 "The 50-State Small Business Regulation Index," by Wayne Winegarden, Ph.D., Pacific Research Institute, July 2015 at www.pacificresearch.org/fileadmin/images/Studies_2015/SmBusinessIndex_UpdatedVersion2_web.pdf.

3 "Freedom in the 50 States, 2013 Edition," by William P. Ruger and Jason Sorens, Mercatus Center at George Mason University, at <http://freedominthe50states.org/about>.

4 "2015 Best and Worst States for Business," Chief Executive, at <http://chiefexecutive.net/2015-best-worst-states-business/>.

5 Ibid.

6 "U.S. Small Business Friendliness Survey," Thumbtack.com, August 2015 at www.thumbtack.com/survey#/2015/1/states.

In recent years the Department of Commerce, the State Auditor, the Department of Revenue and the Washington Economic Development Commission (WEDC) have released separate reports describing the morass of regulations employers must know, understand and obey in order to do business legally in our state. Each of these state government reports recommends the state provide regulatory relief in order to retain and attract businesses. In a strongly worded condemnation of our state's regulatory climate, the WEDC concluded:

*“Washington’s overly burdensome regulatory system must be addressed as a top economic development priority.”*⁷

In 2010, Governor Gregoire sought to stem the proliferation of burdensome and unnecessary regulations by issuing Executive Order 10-06, by which she placed a one-year moratorium on all non-critical rulemaking activities by state agencies. It was noted at that time that the Department of Ecology alone had over 43 FTEs working to impose 26 rules.⁸ Gregoire extended that moratorium for a second year with Executive Order 11-03.⁹

Despite the moratorium on non-critical agency rulemaking, over the course

of just two years (2011-2012), state agencies imposed a total of 805 new, permanent rules and 909 temporary, emergency rules that together filled 15,754 pages and changed 10,047 sections of the Washington Administrative Code (WAC).¹⁰

It could have been worse. As a result of the moratorium, between 2011-2012, agencies put 857 planned rules on hold and eliminated 141 altogether.¹¹

Since then, things have not improved. In 2015, state agencies filed 1,535 new rules that fill 15,727 pages. They adopted 1,046 of those rules, filling 9,147 pages and changing 5,305 sections of the WAC.¹²

In addition to the sheer volume of rules adopted by state agencies is the problem of imposing regulation without public accountability or representation.

People in the business community have long been concerned about unelected agency officials imposing rules that overstep their agency's legal authority. Many believe unelected agency officials increasingly use the rulemaking process to impose onerous regulations that normally would not be approved by the elected Legislature. They argue some regulations are so sweeping they should be subject to the transparency and accountability that come with review by elected, representative bodies.

7 “Driving Washington’s Prosperity: A Strategy for Job Creation and Competitiveness,” Washington Economic Development Commission, March 2013 at www.wedaonline.org/documents/Con2014/2013StrategicPlan.pdf.

8 “Governor responds to Representative’s request to temporarily suspend state agencies’ rulemaking activities,” press release, Washington state House Republicans, November 17, 2010 at <http://houserepublicans.wa.gov/news/budget-and-taxes/governor-responds-to-representatives-request-to-temporarily-suspend-state-agencies-rulemaking-activities/>.

9 “Gov. Gregoire extends rule moratorium,” press release, Office of the Governor, October 13, 2011, at www.digitalarchives.wa.gov/GovernorGregoire/news/news-view.asp?pressRelease=1784&newsType=1.

10 Agency Rule-Making Activity, Office of the Code Reviser, 2011 and 2012, at <http://leg.wa.gov/CodeReviser/Documents/rulactiv.pdf>.

11 “Report to the Governor: 2012 Implementation of Executive Order 11-03, Suspending Non-Critical Rule Development and Adoption,” Office of Financial Management and Office of Regulatory Assistance, January 2013, at www.ofm.wa.gov/reports/eo10-03_2012report.pdf.

12 Agency Rule-Making Activity, Office of the Code Reviser, 2015, at <http://leg.wa.gov/CodeReviser/Documents/rulactiv.pdf>.

For example, the business community strenuously objected to the sweeping ergonomics rule adopted by the state department of Labor & Industries (L&I) in 2000. Employers said the agency's controversial rule was so strict it would cripple some industries. The agency's rule was ultimately overturned by voters in 2003, who agreed the regulation went too far. Yet another restrictive rule that was adopted by L&I officials was overturned by a superior court judge in 2001, after he found the rule to be "arbitrary and capricious."¹³

Policy Analysis

SB 6396 would require state agencies to submit all proposed new rules or amendments to existing rules to the Attorney General for an opinion as to its constitutionality and legality.

Additionally, SB 6396 would establish a yearly expiration date for all agency rules, unless the Legislature passes legislation to postpone the expiration. Any rule adopted or amended before November 1 of any year would expire on June 1 of the following year unless the Legislature passed legislation to extend the rule. If a rule expires, the agency could not re-impose the rule unless expressly authorized by statute.

The bill would go into effect July 1, 2016.

SB 6396 would serve the public interest because it would ensure state agencies do not overstep their authority and would assure the public and lawmakers that agency rules are legal and constitutional.

It would also end frequent claims of regulation without representation

by giving the elected members of the Legislature the final say on new regulations. Such legislative oversight would serve the dual purpose of holding unelected agency officials accountable for the regulations they want to impose on citizens, and would hold lawmakers accountable for supporting or opposing those regulations.

Not all new agency rules are the result of rogue, control-loving bureaucrats; many agency rules are the result of legislative mandate. A vote on new rules would force lawmakers to be accountable to the public for the regulations they have directed agencies to implement.

The bill could also slow the pace at which new rules proliferate. If agency officials know the Attorney General must confirm the legality of proposed rules before they are adopted, and that the Legislature will have the final say on whether a rule remains in force, they will be less likely to adopt illegal or overreaching rules in the first place.

Conclusion

There is no question state agencies have replaced the Legislature as the primary vehicle for day-to-day lawmaking. As a result, complaints of agency overreach have grown in recent years.

Some agency officials seem to consider rulemaking an easy way to impose their will on citizens, while some lawmakers use rulemaking as a way to implement unpopular or controversial regulations without public scrutiny, leaving unelected agency officials to face public criticism.

Either way, the rules imposed by agencies carry the same legal force and threat of punishment as those passed by the Legislature. Citizens

¹³ "Rebate ruling is win for builders group: Cap affecting workers' comp money tossed out," by Dave Postman, *The Seattle Times*, October 2, 2001, at <http://community.seattletimes.nwsourc.com/archives/?date=20011002&slug=builders02m>.

must comply or face legal and financial consequences. When unelected agency bureaucrats create such rules there is significantly less accountability, transparency and public debate than when elected representatives in the Legislature pass new laws.

SB 6396 is a common-sense solution to a very serious problem. It would instill accountability into the rulemaking process by preventing unelected agency officials and lawmakers from unilaterally imposing regulations with no concern for the consequences. The result would be increased public accountability and a much-needed check and balance system on agency rulemaking activity.

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