

EMERGENCY RULEMAKING STATUTORY PROVISIONS

At its September 14, 2010, meeting, the Administrative Rules Committee reviewed a district court decision concluding that the State Board of Pharmacy did not substantially comply with the notice requirement applicable to adoption of emergency rules and that the rules in question were not effective on an emergency basis.

The district court judge pointed out the statutory requirement that, as part of emergency rulemaking, the agency shall take appropriate measures to make interim final rules known to every person that may be affected by them. The judge reasoned that taking "appropriate" measures to make emergency rules known to affected persons is a flexible requirement and, because the consequences of this rule would include possible imprisonment, an elevated effort by the agency to provide public notice is required.

North Dakota Century Code Chapter 28-32 sets out the requirements for administrative rulemaking. The only provisions of Chapter 28-32 which apply only to emergency rules are contained in Section 28-32-03 which provides:

1. If the agency, with the approval of the governor, finds that emergency rulemaking is necessary, the agency may declare the proposed rule to be an interim final rule effective on a date no earlier than the date of filing with the legislative council of the notice required by section 28-32-10.
2. A proposed rule may be given effect on an emergency basis under this section if any of the following grounds exists regarding that rule:
 - a. Imminent peril threatens public health, safety, or welfare, which would be abated by emergency effectiveness;
 - b. A delay in the effective date of the rule is likely to cause a loss of funds

- appropriated to support a duty imposed by law upon the agency;
 - c. Emergency effectiveness is reasonably necessary to avoid a delay in implementing an appropriations measure; or
 - d. Emergency effectiveness is necessary to meet a mandate of federal law.
3. A final rule adopted after consideration of all written and oral submissions respecting the interim final rule, which is substantially similar to the interim final rule, is effective as of the declared effective date of the interim final rule.
4. The agency's finding, and a brief statement of the agency's reasons for the finding, must be filed with the legislative council with the final adopted emergency rule.
5. The agency shall take appropriate measures to make interim final rules known to every person who may be affected by them.
6. An interim final rule is ineffective one hundred eighty days after its declared effective date unless first adopted as a final rule.

One of the procedural circumstances the judge indicated as significant is that the notice of rulemaking under Section 28-32-10 contained nothing to indicate that the rules had been adopted to add new controlled substances on an interim or emergency basis. There is nothing in Chapter 28-32 that would require any indication in the notice of rulemaking regarding emergency rules. The Administrative Rules Committee may wish to consider adding a provision to Section 28-32-03 to require the notice to identify any emergency rule adopted or under consideration.