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Administrative Law

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Administrative Law

Administrative Law; regulatory relief

Code of Civil Procedure §1028.5 (new); Education Code §§18000, 18001, 21000, 21001 (repealed); Government Code §§8000, 8001, 8002, 8003, 8004, 8004.5, 8005, 8006, 8007, 8008, 8009, 8010, 8011, 8850, 8851, 8852, 8853, 8854, 11340.4, 11343.4, 11344.6, 11344.8, 11346.11, 11346.51, 11346.6, 11346.8, 11346.81, 91554 (repealed); §§11344.6, 11346.8, 16481.1, 91553 (new); §§11270, 11340, 11340.1, 11343.5, 11343.6, 11343.7, 11343.8, 11343.9, 11344, 11344.2, 11344.3, 11344.4, 11344.5, 11344.7, 11346.1, 11346.2, 11346.4, 11346.5, 11346.7, 11347.2, 11347.3, 11349, 11349.1, 11349.3, 11349.4, 11349.5, 11349.6, 11349.7, 11350, 17220, 91557 (amended); Health and Safety Code §26604 (repealed); §§18911, 44522 (amended); Streets and Highways Code §§227, 228, 31460, 31461 (repealed); §2158 (new).

AB 1014 (McCarthy); STATS. 1981, Ch 865

SB 216 (Boatwright); STATS. 1981, Ch 1091

Opposition: Department of Corporations; Department of Finance; Department of Industrial Relations

SB 498 (Presley); STATS. 1981, Ch 983

SB 726 (Beverly); STATS. 1981, Ch 592

Support: Department of Fish and Game; Office of Administrative Law

Opposition: Department of Industrial Relations; Department of Real Estate

SB 512 (Rains); STATS. 1981, Ch 604

Support: Department of Finance; Department of Transportation

SB 575 (Carpenter); STATS. 1981, Ch 814

Support: Department of Economic and Business Development

Opposition: Department of Finance

Chapters 592, 604, 814, 865, 983, and 1091 (hereinafter referred to as the Relief Package) modify the relationship between the Legislature and the Office of Administrative Law (hereinafter referred to as the OAL)¹ and expand the scope of the OAL's analysis of proposed regula-

1. See CAL. GOV'T CODE §§11340.1 (must work more closely with legislature), 11349.7(f) (make periodic recommendations to legislature). *But see id.* §§11343, 11346.2, 11349.1; CAL. HEALTH & SAFETY CODE §18911 (for removal of Building Standards Commission from review process).

tions.² The Relief Package also requires agencies proposing new regulations to include additional data in their reports to the OAL³ and encourages the public to participate in the adoption of the new regulations.⁴ Finally, the Relief Package requires justification of the use of urgency clauses in proposed regulations,⁵ eliminates several boards and commissions,⁶ and allows the courts to award reasonable litigation⁷ expenses for small business suits against regulatory agencies.⁸

*Regulatory Relief: new administrative regulations*⁹

In recognition of the fact that administrative regulations were increasing in number,¹⁰ as well as becoming more complex¹¹ and costly to implement,¹² legislation was enacted in 1979 that created the OAL.¹³ As a department directly responsible to the executive branch, the OAL was to review regulations with the goal of reducing the number and improving the quality of all new regulations.¹⁴ Chapter 865 indicates that while the OAL is still a part of the executive branch, it must work more closely with the Legislature.¹⁵ In addition, Chapter 865 eliminates the requirement that state agencies pay for the services of the OAL.¹⁶

Existing law requires certain supplementary information¹⁷ to be submitted to the OAL with all regulations proposed by state agencies.¹⁸ Upon receipt of that information, the OAL must perform an analysis determining the necessity, authority, clarity, consistency, and reference

2. See CAL. GOV'T CODE §11349(a) (necessity includes whether or not proposed regulation duplicates purpose of another existing or proposed regulation).

3. See *id.* §§11346.7(a)(3), 11347.3(a)(4).

4. See *id.* §11346.5(9) (must request hearing no later than 15 days prior to the close of the written comment period). See also *id.* §§11346.4, 11346.8.

5. CAL. CONST. art. IV, §8(d). See also CAL. GOV'T CODE §11346.1(b).

6. See CAL. STATS. 1981, c. 604, §§1-11, at —.

7. See CAL. CIV. PROC. CODE 1028.5(b) (definition of reasonable litigation expenses).

8. See *id.* §1028.5(a).

9. See CAL. GOV'T CODE §11342(a) (definition of State Agency), (b) (definition of regulation).

10. See CAL. STATS. 1979, c. 567, §1, at 1778 (enacting CAL. GOV'T CODE §11340(a)).

11. See *id.* (enacting CAL. GOV'T CODE §11340(b)).

12. See *id.* (enacting CAL. GOV'T CODE §11340(c)).

13. See *id.* (enacting CAL. GOV'T CODE §11340.1).

14. *Id.*

15. See CAL. GOV'T CODE §§11340.1 (must work more closely with legislature), 11349.7(f) (make periodic recommendations to legislature). But see CAL. GOV'T CODE §§11343, 11346.2, 11349.1; CAL. HEALTH & SAFETY CODE §18911 (removal of Building Standards Commission from review process).

16. See CAL. STATS. 1979, c. 567, §1, at 1778 (enacting CAL. GOV'T CODE §11340.4) (Section 4 of Chapter 865 repeals this Section).

17. See CAL. GOV'T CODE §§11346.5(a)(3), 11346.7.

18. *Id.* §§11346.5(a)(3), 11346.7.

of the proposed regulation.¹⁹ Chapter 865 requires agencies to include in their reports an identification of each study or report that was used in developing the regulation.²⁰ Furthermore, the OAL now must inquire into whether or not the proposed action duplicates another regulation.²¹ The revised report,²² which is submitted to the OAL with the proposed regulation, as well as made available to the public, must also include the statement that if a public hearing has not been held, any interested person may request a hearing.²³ If a public hearing is not requested, written comments regarding the proposed action may be submitted to the agency to be included in their reports to the OAL.²⁴ Chapter 865 also requires that, if a hearing has been held, a regulation cannot be changed subsequent to the hearing without providing an opportunity for a new hearing on the proposed change.²⁵

Prior to the enactment of Chapter 983 and the earlier creation of the OAL,²⁶ an agency could place an urgency clause²⁷ in a proposed regulation and gain rapid implementation of the regulation.²⁸ The courts, while not bound by an agency's determination of whether an urgent situation is in existence, nevertheless, concede that the determination of urgency is primarily a matter within the agency's discretion.²⁹ Chapter 865 places constraints upon the use of the urgency clause by specifying that an urgency clause in itself does not necessarily create an urgent situation that requires rapid passage of the proposal,³⁰ and that the agency must state the reasons for use of the urgency clause in its report

19. *Id.* §11349.1.

20. *See id.* §§11346.7(a)(3), 11347.3(a)(4), 11347.3(b). *See also id.* §11347.3(a)(3) (expands data to be included in report).

21. *See id.* §11349(a) (necessity includes whether proposed regulation duplicates purpose of another existing or proposed regulation).

22. *See* note 20 and accompanying text *supra*.

23. *See* CAL. GOV'T CODE §11346.5(a)(9) (must request hearing no later than 15 days prior to the close of the written comment period). *See also id.* §§11346.4, 11346.8.

24. *See id.* §11346.8. *See* note 23 and accompanying text *supra*.

25. *See* CAL. GOV'T CODE §11346.4.

26. *See* CAL. STATS. 1979, c. 567, §1, at 1778 (enacting CAL. GOV'T CODE §§11340.1, 11340.2).

27. CAL. CONST. art. IV, §8(d) (urgency statutes are those necessary for immediate preservation of the public peace, health, or safety. A statement of facts constituting the necessity shall be set forth in one section of the bill. In each house, the section and the bill shall be passed separately, each by roll call vote. . . . An urgency statute may not create or abolish any office or change the salary, term, or duties of any office, or grant any franchise or special privilege, or create any vested right or interest).

28. *Id.* *See also* CAL. GOV'T CODE §11346.1(b).

29. *See* Poschman v. Dumke, 31 Cal. App. 3d 932, 941, 107 Cal. Rptr. 596, 602 (1973). *See also* Davis v. County of Los Angeles, 12 Cal. 2d 412, 422, 84 P.2d 1034, 1040 (1938) (the requirement for a statement of the facts constituting the necessity in emergency legislation does not modify the principal nor bestow upon the judiciary power to declare the declaration invalid unless it appears clearly and affirmatively from the legislature's statement of facts that a public necessity does not exist).

30. *See* CAL. GOV'T CODE §11346.1(b).

to the OAL.³¹

Upon completion of their analysis of the proposed regulation, the OAL may return a regulation to the agency to be rewritten for failure to comply with Chapter 865,³² or require the agency to show cause why the regulation should not be repealed,³³ or repeal, amend or adopt the regulation.³⁴ If the OAL takes adverse action on the proposed regulation, they must notify the agency of their reasons.³⁵ If the OAL adopts the regulation, however, they may, at the request of the agency, file the new regulation with the Secretary of State's office.³⁶ They must also publish the approved regulation in the California Administrative Code Supplement and the California Administrative Notice Register.³⁷ Finally, Chapter 604 eliminates several administrative boards and commissions.³⁸

*Regulatory Relief: helping the private sector overcome
the regulatory burden*

It has always been possible for members of the private sector to appeal the imposition of state regulations to the judicial system.³⁹ Furthermore, nothing within the Relief Package will deprive an individual of the opportunity to seek an invalidation of regulations through the courts.⁴⁰ Prior to the enactment of Chapter 814, however, the maximum award to the winning private party for costs incurred in litigation with a state agency could not exceed \$1500.⁴¹ In a civil action between

31. *Id.*

32. *See id.* §11349.4 (for example, failure to meet the criteria in Section 11349.1 of the Government Code).

33. *See id.* §11349.7(h).

34. *See id.* §11344.6. *See also id.* §11346.4 (once the adoption, amendment, or repeal is completed and approved by the office, no further adoption, amendment or repeal to the noticed regulation should be made without subsequent notice being given).

35. *See* CAL. GOV'T CODE §11349.3(b).

36. *Compare id.* §11343.8 with CAL. STATS. 1979, c. 567, §1, at 1778 (enacting CAL. GOV'T CODE §11343.9) (prior to Chapter 567, the agency had to file after approval from the OAL).

37. *See id.* §11344. *But see* CAL. STATS. 1979, c. 567, §1, at 1778 (enacting CAL. GOV'T CODE §§11344.6, 11344.8) (for repeal of requested form of codes). *See also id.* §§11343.5, 11343.7, 11344.2, 11344.3, 11344.4, 11344.7, 11347.2 (for conformance with name change).

38. *See* CAL. STATS. 1981, c. 604, §§1-2, at — (those agencies eliminated are the Board of Library Examiners, State Council of Educational Planning and Coordination, the Committee to Fix Interest on Registered Warrants, the California Design Awards Committee, the Advisory Committee on Drug Manufacturing, the Scenic Highway Advisory Committee, the Colorado River Toll Bridge Authority, the California Commission on Interstate Co-operation, the Assembly Committee on Interstate Co-operation, and the Senate Committee on Interstate Co-operation).

39. *See* CAL. GOV'T CODE §800 (damages available if applied in arbitrary and capricious manner).

40. *See id.* §11350(a).

41. *See id.* §800. *See also* Olson v. Hickman, 25 Cal. App. 3d 920, 102 Cal. Rptr. 248 (1972) (explanation of arbitrary and capricious).

a small business⁴² or its licensee⁴³ and a state regulatory agency involving the regulatory function of that agency, Chapter 814 permits the court to award reasonable litigation expenses⁴⁴ to the prevailing private party or licensee providing that the court determines that the regulation was imposed without any substantial justification.⁴⁵

42. *See* CAL. CIV. PROC. CODE §1028.5(c) (definition of small business).

43. *See id.* §1028.5(d) (definition of licensee).

44. *See id.* §1028.5(b) (definition of reasonable litigation expenses).

45. *See id.* §1028.5(a).

