

**State of California
Office of Administrative Law**

**In re:
Department of Personnel Administration**

**Regulatory Action: Title 2
California Code of Regulations**

**Adopt sections:
Amend sections: 599.960, 599.963,
599.965**

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2011-0818-03 S

SUMMARY OF REGULATORY ACTION

The Department of Personnel Administration (Department) proposed this action to amend title 2, California Code of Regulations, sections 599.960, 599.963, and 599.965, which govern the general policies, testing procedures and standards, and authorized medical review officers for drug and alcohol testing of California state employees. Current regulations provide for substance testing of employees in designated sensitive positions on a reasonable suspicion basis and random drug testing for excluded and exempt peace officer employees. The proposed amendments incorporate federal drug and alcohol testing standards and procedures into California's drug and alcohol testing programs. The proposed amendments also provide for periodic follow-up testing of employees who refuse to submit to drug or alcohol testing.

DECISION

On September 30, 2011, the Office of Administrative Law (OAL) disapproved the above-referenced regulatory action because the proposed regulations failed to comply with the necessity and clarity standards contained in Government Code section 11349.1, and for failure to follow proper procedure.

This disapproval decision discusses the identified issues and contains examples of the issues, but is not an exhaustive list of all the problems found. Upon resubmission of this matter, OAL reserves the right to conduct a complete review pursuant to the Administrative Procedure Act (APA) for compliance with the procedural and substantive requirements of Chapter 3.5 (commencing with section 11340), Part 1, Division 3, Title 2, of the Government Code. All APA issues must be resolved prior to OAL's approval.

DISCUSSION

Regulations adopted, amended or repealed by the Department must be adopted pursuant to the APA. Any regulatory act a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the APA unless statutorily exempt or excluded. (Gov. Code, sec. 11346.) As no exemption applies in this instance, OAL must review this regulatory action for compliance with both the procedural and substantive requirements of the APA. (Gov. Code, sec. 11349.1.)

A. NECESSITY

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean

. . . the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of title 1 of the California Code of Regulations provides:

In order to meet the ‘necessity’ standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) a statement of the specific purpose of each adoption, amendment, or repeal; and
- (2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An ‘expert’ within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the Initial Statement of Reasons (Gov. Code, sec. 11346.2(b)). The Initial Statement of Reasons is the primary document in the rulemaking record that demonstrates that the adoption, amendment, or repeal satisfies the “necessity” standard. The Initial Statement of Reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed; or, simply restated, “why” a

regulation is needed and “why” the particular provisions contained in the regulation were chosen to fill that need (Gov. Code, sec. 11346.2(b)(1)).

The Initial Statement of Reasons must be submitted to OAL with the Notice of the Proposed Action and be made available to the public during the public comment period, along with all the information upon which the proposal is based (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) This information is essential in order to allow the public to comment knowledgeably. The Initial Statement of Reasons and all data and other factual information, studies or reports upon which the agency is relying in the regulatory action must also be included in the rulemaking file (Gov. Code, sec. 11347.3(b)(2) and (7).)

The Initial Statement of Reasons provided with this regulatory action is inadequate. For the most part, it describes that the regulations are needed to conform to existing Department policy without describing or explaining how the Department’s policy effectuates the purpose of the statute. The Initial Statement of Reasons fails to provide the public with the rationale for the determinations by the Department as to why the specific regulatory changes are needed to carry out the purpose for which they are proposed. This vital information should have been made available to the public during the rulemaking process so that the public is informed of the basis of the proposed action and can comment knowledgeably during the public comment period.

The following examples are statements from the Department’s Initial Statement of Reasons that demonstrate the types of necessity issues to be addressed by the Department prior to its resubmission of this regulatory action. However, all of the regulatory provisions in this action need to be supported by adequate necessity and will have to be resolved prior to approval by OAL.

Example 1. The Department’s Initial Statement of Reasons states:

Section 599.963 contains references to standards and procedures which are used by the State to conduct drug and alcohol testing. These standards and procedures are being revised to incorporate the changes that have been made in the State’s policy for breath alcohol testing. (Initial Statement of Reasons, p. 3.)

Example 2. The Department’s Initial Statement of Reasons states:

Under Section 599.963 (a), the existing language states that the State will use “(2) breath sample testing using breath alcohol analyzing instruments which meet the State Department of Health Services standards specified in Title 17, Division 1, Chapter 2, Subchapter 1, Group 8, Article 7, Sections 1221.2 and 1221.3 of the California Code of Regulations”.

This language is being eliminated because only breath alcohol testing instruments specified in the Federal regulations are used by the State to conduct alcohol testing. ... (Initial Statement of Reasons, p. 3.)

Example 3. The Department’s Initial Statement of Reasons states:

Under Section 599.963 (g), the language stating “the standards used by the College of American Pathologists (CAP) to accredit laboratories for forensic urine

drug testing (Standards for Accreditation, Forensic Urine Drug Testing Laboratories, College of American Pathologists)” is being eliminated. The only laboratories used by the State to conduct workplace drug and alcohol testing are those certified by SAMHSA [Substance Abuse Mental Health Services Administration, Mandatory Guidelines for Federal Workplace Drug Testing Programs]. (Initial Statement of Reasons, p. 4.)

The above examples show how the Department’s necessity statements explain that the amendments to the drug and alcohol testing regulations are being made to conform to the Department’s current policy, not how the amendments are necessary to effectuate the purpose of the statute that the regulation implements. It is statutorily mandated that the Department articulate its reasons for adopting, amending or repealing a regulatory provision so that the public has an opportunity to comment on the process and the reasoning of the Department. The Department will need to introduce a statement of reasons into the rulemaking file that resolves the necessity issues by making the document available during a 15-day notice of availability pursuant to Government Code section 11347.1.

B. CLARITY

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to the persons who must comply with them (Gov. Code, sec. 11340(b)). Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the “clarity” standard. Government Code section 11349(c) defines “clarity” to mean “...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them.”

Section 16 of title 1 of the CCR declares in relevant part that:

In examining a regulation for compliance with the ‘clarity’ requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

- (a) A regulation shall be presumed not to comply with the ‘clarity’ standard if any of the following conditions exist:
 - (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or . . .
 - (5) the regulation presents information in a format that is not readily understandable by persons ‘directly affected;’ . . .

In this rulemaking, OAL determined that several regulatory provisions did not satisfy the clarity standard. This decision provides examples of the clarity issues that exist in the proposed regulations and that were discussed with the Department. All clarity issues raised by OAL in this decision and to the Department personnel must be addressed prior to approval by OAL.

Example 1.

An amendment to section 599.960(d) adds an employee who refuses to test to the list of employees who would be subject to periodic drug and alcohol testing. The Initial Statement of Reasons is more specific about this, stating that periodic follow-up testing would be required “for employees who refuse to submit to drug or alcohol testing under Section 599.960(c) and (e).” (Initial Statement of Reasons, p. 4.) This description of the regulation conflicts with the language of the regulation. Subdivisions (c) and (e) of section 599.960 provide for drug and alcohol testing for testing of employees in designated sensitive positions on a reasonable suspicion basis (subdivision (c)) and for employees taking medications under a legal prescription but who cannot perform their work without posing a threat to the health or safety of the employee or others (subdivision (e)). The Department will need to modify the new language in section 599.960(d) to specify that only employees who refuse to test under section 599.960(c) and (e) would be subject to periodic follow-up testing, otherwise this provision might be interpreted broadly to include any employee who refuses a drug and alcohol test, not just employees subject to drug and alcohol testing under subdivisions (c) and (e) of section 599.960.

Example 2.

The original 45-day text incorporated by reference two federal regulations by referring to the title and publication dates of those regulations: October 1, 2004 for the Federal Motor Carrier Safety Regulations, and April 13, 2004 for the SAMHSA Mandatory Guidelines for Federal Workplace Drug Testing Programs. In the 15-day modified text, the Department removed the date designations and added “including any amendments” to the related federal regulations. This presents a clarity issue because nobody would know which version of the federal regulations would be applicable, resulting in a regulation that would not be easily understood by those directly affected.

OAL discussed with Department personnel the possibility of reverting back to the October 1, 2004 and April 13, 2004 dates from 45-day text. The Department instead decided to revise the dates to the most recent version of both federal regulations, which were published sometime during 2008 to 2010. The Department will need to issue a 15-day notice for modified text pursuant to Government Code section 11346.8 to make the changes to clearly identify the publication dates of the incorporated federal regulations.

C. FAILURE TO FOLLOW PROPER PROCEDURE

OAL must review rulemaking records to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, sec. 11349.1.) The Department failed to follow procedures required by Government Code section 11346.5(a)(6) and its implementing regulation in section 6615 of the State Administrative Manual, Government Code section 11346.9(b), and sections 20, 86, and 90 of title 1 of the California Code of Regulations.

1. Government Code section 11346.5(a)(6) and its implementing regulation in section 6615 of the State Administrative Manual requires state agencies to complete a form adopted by the Department of Finance, the STD. 399, and to obtain the concurrence of the Department of Finance when specified information is entered on the form. The Department checked a box on the form that requires the concurrence, by way of its signature, of the Department of Finance on

the STD. 399 pursuant to section 6615 of the State Administrative Manual, but the requisite Department of Finance signature was not on the form. The Department needs to either obtain Department of Finance signature on the form or revise the form so that it does not require Department of Finance signature.

2. Government Code section 11346.9(b) requires the Department to include an Updated Informative Digest in the rulemaking file that contains

a clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation. The informative digest shall be drafted in a format similar to the Legislative Counsel's Digest on legislative bills.

The Department included an Updated Informative Digest in the rulemaking file that merely restated the information in the 45-day notice and in the Initial Statement of Reasons that summarize the existing regulations and the proposed amendments to them. This action, however, included a 15-day notice of availability of modified text in which there were substantial changes made to the text of the originally proposed regulations. Moreover, some of the modifications were made due to changes in the incorporated federal standards. The Updated Informative Digest does not update anything that had an effect on the rulemaking action or any changes in underlying federal regulations that might require the incorporated by reference federal standards to be updated.

3. Section 20 of title 1 of the California Code of Regulations provides the requirements for incorporation by reference of other documents into a regulation "whereby a regulation printed in the California Code of Regulations makes provisions of another document part of that regulation by reference to the other document." (Tit. 1, Cal. Code Regs., sec. 20(a).)

A. Section 20(c)(3) provides ". . . If, in accordance with Government Code section 11346.8(c), the agency changes the originally proposed regulatory action or informative digest to include the incorporation of a document by reference, the document shall be clearly identified by title and date of publication or issuance in the notice required by section 44 of these regulations." In the text made available in the 15-day notice of availability of modified text, the Department revised the incorporation of the specific federal standards that were identified by their specific date of publication to include any future amendments to those federal standards. The Department will need to revise the text in another 15-day notice of availability of modified text to identify clearly the date of publication of the incorporated federal standards.

B. Section 20(c)(1) and (2) require that "The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations" and that "The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. . . ." The Department did not

include statements in the Final Statement of Reasons to demonstrate either of the preceding requirements. These statements will need to be added to the Final Statement of Reasons before the Department resubmits this action.

C. Section 20(c)(3) requires that “The informative digest in the notice of proposed action clearly identifies the document to be incorporated by title and date of publication or issuance. . . .” In the informative digest contained in the Department’s 45-day notice, the Department provided a general reference to the federal standards that were intended to be incorporated into the regulations, but did not clearly identify the federal standards to be incorporated by title and date of publication or issuance. This will need to be corrected by clearly identifying in the Updated Informative Digest the federal standards being incorporated by title and date of publication or issuance when the Department resubmits this action.

D. Section 20(c)(4) requires “The regulation text states that the document is incorporated by reference” After each of the federal standards being incorporated by reference in the regulations, the Department will need to indicate in the regulation text that the federal standard is being incorporated by reference.

4. Section 86 of title 1 of the California Code of Regulations requires the Department to include a mailing certification statement that certifies compliance “with the provisions of Government Code Section 11346.4(a)(1) through (4) regarding the mailing of notice of proposed action at least 45 days prior to public hearing or close of the public comment period,” (Tit. 1, Cal. Code Regs., sec. 86.) Among other things, section 86 requires the mailing certification statement to include “the date upon which the notice was mailed.” The Department’s mailing certification statement is missing this date. The Department will need to replace the mailing certification statement in the rulemaking file with one that includes the date upon which the notice was mailed prior to resubmitting this action.

5. Section 90 of title 1 of the California Code of Regulations implements Government Code section 11347.3(b)(8) and requires the rulemaking file to contain a transcript, recording, or minutes of any public hearings held that pertains to the rulemaking action. The Department’s rulemaking file contained only the following documents: a page containing a statement that says, “No one attended the public hearing and no oral comments were provided,” a page that provides the time and place of the public hearing (this page looks similar to a cover page for a transcript), and a blank sign-in sheet. Section 90(a) requires documentation to satisfy Government Code section 11347.3(b)(8) to

- (a) . . . fully and accurately reflect all proceedings applicable to the rulemaking action under review and shall be adequate:
 - (1) to ensure effective review of the record by OAL, in light of the provisions of the APA providing for meaningful public participation; and
 - (2) to permit effective judicial review of the record.

The documentation that the Department included in the rulemaking file does not constitute a transcript or a recording. Furthermore, section 90 requires any minutes submitted in fulfillment

of the Government Code section 11347.3(b)(8) requirement to “provide a summary of the proceedings, and in all cases shall contain information sufficient to meet the requirement specified in subsection (a).” (Emphasis added.) The Department will need to add a transcript, recording, or minutes of the public hearing to the rulemaking file in compliance with section 90 prior to resubmitting this action.

CONCLUSION

For the reasons described above, OAL disapproved this regulatory action because it did not comply with the clarity and necessity standards, and for failure to follow proper procedure.

Please contact me at (916) 323-6809 if you have any questions.

Date: October 7, 2011



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