

**State of California
Office of Administrative Law**

In re:
California Apprenticeship Council

Regulatory Action:

Title 8, California Code of Regulations

Adopt sections:

Amend sections: 205, 206, 207, 212, 212.2,
212.3

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2014-1120-01S

SUMMARY OF REGULATORY ACTION

On November 20, 2014, the California Apprenticeship Council (Council) submitted its proposed regulatory action to the Office of Administrative Law (OAL) to amend procedures for (1) audits of general apprenticeship programs; and (2) approval of new or expanded building and construction trades apprenticeship programs to conform to statutory changes.

On January 7, 2015, OAL notified the Council that OAL disapproved the proposed regulations. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action, as discussed below.

1. The Council failed to follow required Administrative Procedure Act (APA) procedures as follows:
 - 1.1. failure to provide an estimate of costs, prepared in accordance with instructions adopted by the Department of Finance, pursuant to Government Code section 11346.5, subdivision (a)(6);
 - 1.2. failure to duly make available additions to the initial statement of reasons (ISOR), as a document relied upon in proposing the action, pursuant to Government Code section 11347.1;

- 1.3. failure to submit and make available evidence on which the Council relied to support its initial determination that the action will not have a significant adverse economic impact on business, pursuant to Government Code section 11346.2, subdivision (b)(5)(A);
 - 1.4. failure to include an updated informative digest in the rulemaking file, pursuant to Government Code section 11347.3, subdivision (b)(2);
 - 1.5. failure to submit a determination as to whether amendment of the regulation imposes a mandate on local agencies or school districts, and if so, whether the mandate is reimbursable, pursuant to Government Code section 11346.9, subdivision (a)(2), (to be included in the Final Statement of Reasons (FSR));
 - 1.6. failure to submit a determination with supporting information that no alternative considered by the Council would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law, pursuant to Government Code section 11346.9, subdivision (a)(4), (to be included in the FSR);
 - 1.7. failure to include authority and reference citations in the regulation text pursuant to Government Code section 11346.2, subdivision (a)(2) and California Code of Regulations, title 1, section 8, subdivision (a)(1); and
 - 1.8. failure to use underline in the final text of the regulation to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations, pursuant to California Code of Regulations, title 1, section 8, subdivision (b).
2. The regulations fail to comply with the necessity standards of Government Code section 11349(a).

All APA issues must be resolved prior to OAL's approval of any resubmission.

DISCUSSION

Regulatory amendments must satisfy requirements established by the part of the APA governing rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, § 11346.)

Before any regulation subject to the APA may become effective, OAL reviews the regulation for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an

independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective. Discussion of the issues presented in the decision follows.

1. Failure to Follow Required APA Procedures

The Administrative Procedure Act (APA) requires agencies to follow specific procedures. In this rulemaking action, the Council failed to follow the required procedures.

1.1. Failure to Obtain Department of Finance Concurrence

The notice of proposed adoption, amendment, or repeal of a regulation shall include an estimate, prepared in accordance with the instructions adopted by the Department of Finance, of the cost to any local agency or school district that is required to be reimbursed, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state. (Govt. Code, § 11346.5, subd. (a)(6).) OAL shall return any regulation to the adopting agency if the adopting agency has not prepared the estimate. (Govt. Code, § 11349.1, subd. (d)(1).)

A state agency adopting, amending, or repealing a regulation shall use the form STD. 399 to make a determination and develop an estimate of that proposed regulation's fiscal impact on local governments. The Fiscal Impact Statement section of the STD. 399 must be completed and signed by the agency when a notice of proposed action is submitted for publication in the California Regulatory Notice Register. (State Admin. Manual, § 6614.) The state agency must obtain Department of Finance concurrence in its estimate of the fiscal impact of its proposed regulation on governmental agencies, depicted as "A.6-Other" and/or "B.4-Other" on the STD. 399, *inter alia*. (State Admin. Manual, § 6615.)

The Council submitted to OAL its estimate of the fiscal impact of its proposed regulation on governmental agencies, depicted on the STD. 399 as "A.6-Other" and "B.4-Other," but did not obtain Department of Finance concurrence.

1.2. Failure to Make ISOR Additions Publicly Available

A rulemaking agency shall prepare and submit an initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. The statement of reasons shall include a statement of the specific purpose of each adoption, amendment, or repeal, the problem the agency intends to address, and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it proposed. (Govt. Code, § 11346.2, subd. (b)(1).)

When an agency adds any document to the rulemaking file after the publication of the notice of proposed action and relies on the document in proposing the action, it shall make the document available to the public for a 15-day comment period. A rulemaking agency shall mail a notice to all interested persons. This notice must identify the added document and state

the place and business hours that the document is available for public inspection. (Gov. Code, § 11347.1, subd. (a)-(c).)

A rulemaking agency relies upon its statements in its ISOR when proposing a rulemaking action and publishing its notice of proposed action. Adding statements to the ISOR after publication of the notice of proposed action is tantamount to adding a document relied upon to the rulemaking file after publication of the notice of proposed action. A rulemaking agency adding statements to the original ISOR after publication of the notice of proposed action must make the additions available to the public for at least a 15-day comment period.

The Council added multiple statements of necessity to its ISOR after publication of the notice of proposed action. (*See e.g.*, ISOR, p. 2, adding statements of necessity to proposed amendments to California Code of Regulations, title 8, sections 205 and 206.) The Council did not make the added statements of necessity publicly available before adopting the proposed action.

1.3. Conclusory Statement of No Significant Adverse Economic Impact on Business

The rulemaking agency shall prepare, submit to OAL, and make available an ISOR, which shall include evidence on which it relies to support its initial determination that the action will not have a significant adverse economic impact on business. (Govt. Code, § 11346.2, subd. (b)(5)(A).)

The Council determined its rulemaking action will not have a significant impact on business. (ISOR, p. 4.) However, the Council failed to submit and make available any evidence supporting its determination.

1.4. Failure to Include an Updated Informative Digest in the Rulemaking File

Every agency's rulemaking file shall include an updated informative digest (Govt. Code, § 11347.3, subd. (b)(2).)

Although the Council listed an updated informative digest on its table of contents, the Council failed to include an updated informative digest in its rulemaking file.

1.5. Failure to Include Local Mandate Determination in the FSR

Every rulemaking agency shall prepare and submit to OAL, included in the FSR, a determination as to whether amendment of the regulation imposes a mandate on local agencies or school districts, and if so, whether the mandate is reimbursable. (Govt. Code, § 11346.9, subd. (a)(2).)

The Council failed to include this determination in its FSR.

1.6. Incomplete Alternatives Determination in the FSR

Every rulemaking agency shall prepare and submit to OAL, included in the FSR, a determination with supporting information that no alternative considered by the Council would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. (Govt. Code, § 11346.9, subd. (a)(4).)

The Council stated in its FSR that “there is no more effective manner in carrying out the proposed rulemaking.” (FSR, p. 2.) This determination is incomplete and fails to conform to the statute.

1.7. Failure to Include Authority and Reference Citations in the Final Text

The final text of a regulation must include authority and reference citations. (Govt. Code § 11346.2, subd. (a)(2); Cal. Code Regs., tit. 1, § 8, subd. (a)(1).)

The Council failed to include authority and reference citations in the final text of its proposed regulation.

1.8. Failure to Underline and Strikeout Final Text

The final text of the regulation shall use underline to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations. (Cal. Code Regs., tit. 1, § 8, subd. (b).)

Current regulatory text reads as follows:

“An ‘Interested Party’ . . . means . . . employer associations or organizations, an *employe* [*sic*] association or organization, or employee representatives, a group of employee representatives, associations or organizations . . .” (Cal. Code Regs., tit. 8, § 205, subd. (j), (*emphasis added*).)

The Council submitted the proposed regulatory text having changed the emphasized word from “employe” [*sic*] to “employer” without underlining the change to accurately indicate the addition of one letter to the California Code of Regulations. The Council also attached a version of final text to the Form 400 bearing no underline or strikeout indicating any other additions or deletions to the text.

2. Necessity

OAL reviews regulations for necessity. The term “necessity” means 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. The statement of reasons shall include a

statement of the specific purpose of each adoption, amendment, or repeal, the problem the agency intends to address, and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it proposed. (Govt. Code, §§ 11349, subd. (a); 11349.1, subd. (a)(1); 11346.2, subd. (b)(1).)

As discussed in Section 1.8, *supra*, the Council changed regulatory text from “employee” [*sic*] to “employer.” The Council, however, included no statement of purpose or necessity in connection with this amendment. The rulemaking record does not demonstrate why the Council decided to change the word “employee” to “employer” as opposed to any other word. Thus, the regulations fail to comply with necessity standards.

3. Miscellaneous

OAL also notes the following issues the Council must address before any resubmission of this rulemaking action:

3.1. Failure to Identify Department of Finance as a Required Concurrence on the Form 400

All regulatory actions submitted to OAL shall include a completed Form 400 which includes the name of another entity required to approve the regulation. (Cal. Code Regs., tit. 1, § 6, subd. (a)(6).)

The Council completed its STD. 399 in a manner that requires concurrence from the Department of Finance, as discussed in Section 1.1, *supra*. The Council did not check the box on the Form 400 indicating required concurrence by the Department of Finance. (Form 400, Item 6.)

3.2. Failure to Include the Notice of Proposed Amendment in the File

The rulemaking file shall include a copy of the published notice of proposed amendment of the regulation. (Govt. Code, § 113467.3, subd. (b)(2).)

The Council included a copy of a notice of proposed amendment of the regulation in the rulemaking file, but it failed to include a copy of the effective notice as it was actually published in the California Regulatory Notice Register. (OAL Notice File No. Z-1108-02; *See* Cal. Reg. Notice Register 2013, No. 47-Z, p. 1807.)

3.3. Failure to Identify the Correct Notice File Number on the Form 400

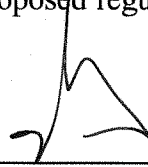
All regulatory actions submitted to OAL shall include a completed Form 400. (Cal. Code Regs., tit. 1, § 6, subd. (a).)

The Council should have listed “Z-2013-1108-02” as the Notice File Number on the Form 400, but incorrectly listed “Z-2013-1008-01” as the Notice File Number. The Council did not complete the Form 400 correctly.

CONCLUSION

For each of the forgoing reasons, OAL disapproved this proposed regulatory action. If you have any questions, please contact me at (916) 323-4217.

Date: January 14, 2015



Mark Storm
Senior Attorney

FOR: DEBRA M. CORNEZ
Director

Original: Glen Forman
Copy: Lucy Wang