



COLORADO
WATER CONGRESS
INFORM | CONVENE | TRAIN | ACT

SB21-028

SHORT TITLE: Promulgation of Public Health Rules and Orders

LONG TITLE: Concerning compliance with the “State Administrative Procedure Act” by certain state entities in the promulgation of legal standards affecting public health.

COMMITTEES: Senate State, Veterans & Military Affairs Committee

SPONSORS: Sen. Kirkmeyer

PURPOSE OF THE BILL: As stated by the sponsor, requires public notice and allows for clear communication to the general public regarding compliance with or guidance pertaining to COVID-19 (or similar situations).

PROPOSERS OF THE BILL: Some local governments and businesses.

POTENTIAL STAKEHOLDERS: Local governments, businesses, CDPHE and the Board of Health

BACKGROUND: Following the declaration of a public health emergency in March 2020 and Over the course of the COVID-19 Pandemic, CDPHE has issued public health orders. However, most of the orders have not been directed at any specific individuals or owners of properties. Instead, were a set of general “rules” applying to every person physically in Colorado depending upon whether they fit into various defined categories. By issuing those rules in public health orders, general concepts of due process were violated because the persons who were the subjects of the rules were not served with the orders and given knowledge of their opportunity to appeal the orders to the district court, as currently allowed in C.R.S. §25-1-515. According to proponents, SB28 remedies this situation by requiring the CDPHE to promulgate rules not through public health orders but, rather, through emergency rulemaking.

According to the fiscal analysts, the following requirements are in place.

Emergency Rules. Under the APA, an emergency rule may be adopted without a hearing and with less than 20 days’ notice, or without any notice, becomes effective on adoption and expires automatically after 120 days. After adopting emergency rules, an agency requests an opinion from the Attorney General’s Officer regarding whether the rule presents any apparent constitutional or legal deficiency in its form or substance. After the Attorney General issues an opinion, the rule is filed with the Secretary of State (SOS) and the Office of Legislative Legal Services (OLLS) and published in the Colorado Register.

Permanent Rules. Prior to adopting permanent rules, an agency must file notice of proposed rulemaking to be published in the Colorado Register. The agency makes the proposed rules available for a minimum of 20 days prior to holding a rulemaking hearing. After adopting permanent rules, the agency requests an opinion from the Attorney General’s Office regarding whether the rule presents any apparent constitutional or legal deficiency in its form or substance. After receipt of the opinion, the agency files the adopted rule with the SOS and the OLLS and the rule is published in the Colorado Register. The rule becomes effective a minimum of 20 days after publication and is then published in the Colorado Code of Regulations. The State Board of Health promulgates rules related to Colorado public health under the APA.

Is this bill necessary this year? Proponents would argue Yes. COVID 19 is not over with new variants arising and potential future viral outbreaks.

How does the bill change current law? There are currently no due process requirements for public health orders to be treated as rules.

Does the bill affect the prior appropriations system? No.

How is the bill implemented? In a public health emergency, if the Board of Health wishes to issue a Public Health Order with rules of general applicability, it would need to first conduct an emergency rulemaking, then provide timely notice and publication for intent to adopt the measure(s) as Permanent Rules.

Practical considerations: In a public health emergency, the strict timelines of the Administrative Procedures Act may prove impossible to comply with; the body would need to look at emergency rulemaking powers then schedule a regular rulemaking under APA guidelines if the public health emergency is a continuing situation.

Fiscal Impact: According to the fiscal note, Costs to follow the APA when issuing an emergency order are estimated at \$15,675 and 0.1 FTE per rulemaking to be paid from the General Fund. For rules that will be in place beyond 180 days, a permanent rulemaking hearing will be required with an additional cost of approximately \$28,000 and 0.2 FTE. Due to the uncertainty of how many additional rulemaking hearings will be held annually, the fiscal note assumes that these costs will be addressed through the annual budget process. [Fiscal Note](#)