

This is Chris Micheli with the Sacramento governmental relations firm of Aprea and Micheli and an adjunct professor at McGeorge School of Law in its Capital Lawyering Program. Today's podcast is examining regular versus emergency rulemaking in the State of California.

The Office of Administrative Law, or the OAL, is charged with ensuring that agency and department regulations are clear, necessary, legally valid, and available to members of the public. The OAL is responsible for reviewing proposed regulations adopted by California's more than 200 state agencies and departments that have rulemaking authority.

The formal rulemaking process is established by the California Administrative Procedure Act, the APA. The state APA sets forth the criteria by which OAL reviews all of these adopted regulations.

Every department, division, office, officer, bureau, board, or commission in the executive branch of California state government must follow the rulemaking procedures that are set forth in the APA as well as the regulations adopted by the Office of Administrative Law that comprise the rulemaking process.

The only exception is for those entities that are expressly exempted by statute from some or all of the APA rulemaking requirements.

There are two types of rulemaking. According to the Office of Administrative Law, the two types of rulemaking procedures that a state agency or department can pursue are regular rulemaking and emergency rulemaking.

The regular rulemaking process requires that a state agency must meet certain public hearing and notice requirements pursuant to the APA. The emergency rulemaking process has different requirements, but it generally includes a brief public notice period, a brief public comment period, shortened review by the OAL, and an OAL decision.

Whether they're engaged in the regular or the emergency rulemaking process, an agency or department of the state government will be bound to follow the procedural requirements that are found in the APA.

These include the contents of the rulemaking record, the initial statement of reasons, the final statement of reasons, timeframes, and appropriate opportunities for public participation, either written or verbal.

The vast majority of regulations that are adopted pursuant to the APA are submitted to the OAL as regular rulemaking procedures. Roughly 500 regulations are adopted by these 200-plus rulemaking bodies in the State of California.

Unless a proposed rulemaking action is submitted to the OAL as an emergency rulemaking or is otherwise exempted from the APA process, then the regular rulemaking process must be complied with when an agency or department undertakes a regulation.

This regular rulemaking process includes comprehensive public notice, a minimum 45-day comment period, among other provisions. The regular rulemaking process also requires the documents and information upon which the rulemaking agency is action is based are made available for public review and inspection.

This comprehensive public notice and opportunity to be heard process is intended to further the goals of public participation in the rulemaking process and to create an adequate rulemaking record for review by the OAL, and if necessary, by the courts.

In terms of emergency rulemaking, the general rule is that a state agency may adopt emergency regulations in response to a situation that calls for immediate action in order to avoid serious harm to either the public, peace, health, safety, or general welfare, or if a statute deems a situation to be an emergency under the APA.

Because emergency regulations are intended to avoid serious harm and they require immediate action, the emergency rulemaking process is substantially abbreviated in comparison to the regular rulemaking process. The OAL reviews emergency regulations for compliance with the APA's emergency rulemaking requirements.

If an emergency rulemaking is undertaken, a Form 400 is used. This form contains the proposed text and the finding of emergency that is submitted by the rulemaking body. These documents may be revised or withdrawn during the OAL five-day review process.

Unless the emergency situation clearly poses an immediate serious harm that delaying action to allow public comment would be inconsistent with the public's interest, then the OAL must allow five calendar days for public comment after the posting of a notice and the filing of the proposed emergency regulation that's done on its website.

In addition, some agencies and departments have requirements related to regular or emergency rulemaking that are unique to that particular agency or department. The APA standards and procedures for emergency rulemakings were revised on January 1, 2007, and have been in effect since that time.

These standards should be reviewed prior to undertaking an emergency rulemaking or commenting thereon. In the meantime, interested parties should regularly review the OAL website for proposed regular and emergency rulemaking actions. Thanks for joining this podcast.