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Today's podcast is why the Legislature should not create APA exemptions. A fundamental purpose of both the federal and California Administrative Procedure Acts, the APA, is to allow public participation in the federal and state rulemaking processes. This is where the executive branch engages in their quasi-legislative activities by adopting rules and regulations to implement statutes that are passed by the legislative branch of government.

Key to allowing public participation is providing notice to the public of the proposed rulemaking as well as an opportunity to be heard during the rulemaking process. However, with any exemption from the formal rulemaking process, that exemption precludes any meaningful public participation because notice to the public is lacking and therefore so is the ability for interested parties to participate in and ultimately to advocate for or against proposed regulations or changes to existing regulations.

As such an exemption from the APA in the state of California is really contrary to the spirit of the law and the rulemaking process. Unfortunately, legislation that creates exemptions from the APA is becoming more prevalent in the California Legislature.

According to our state's Office of Administrative Law, OAL, it's the state agency by the way that's charged with ensuring compliance with the APA, the Administrative Procedure Act requirements are designed to provide the public with a meaningful opportunity to participate in the adoption of regulations or rules that have the force of law by California state agencies and to ensure the creation of an adequate record for the public, OAL and judicial review.

As you may recall, all regulations are subject to the APA unless expressly exempted by statute. According to the Office of Administrative Law, OAL, the following are some of the common examples of exemptions to the APA including a local rule, internal management, forms, audit guidelines, the only legally tenable interpretation, rates, prices and tariffs, legal rulings of tax counsel and precedent decisions. I would add to this list the use of statutory exemptions created by the Legislature.

It's my belief that the California Legislature should refrain from abrogating public participation and input into the rulemaking process. What warrants these legislative exemptions from the APA? Time sensitivities cannot because in my mind, in addition to the regular rulemaking process, there's already an existing emergency rulemaking process under the APA. In emergency rulemaking, there's a shortened time for both public notice and the time to submit written comments.

Such emergency regulations are in effect for 180 days. There are some extensions allowed so that the regulatory entity can commence their regular rulemaking on the same topic shortly thereafter. Nonetheless, emergency rulemaking still allows for public participation albeit a limited one. However, outright exemptions from the APA preclude any public notice and participation in the process.

What other reasons exist to bypass the APA? Does the statute speak entirely to the subject matter at hand and therefore no regulation is needed? In such cases,

perhaps a regulation is not necessary, but that does not mean that there should be no rulemaking allowed. It is one thing if regulations are not necessary based upon a determination made by the regulatory agency.

Obviously, many statutes do not need implementing regulations or other means of interpreting the statutory language. But it's entirely different to not subject regulations to the formal public notice and participation process.

As we've noted, the OAL is charged with ensuring that agency and department regulations are "clear, necessary, legally valid, and available to the public." OAL is responsible for reviewing proposed regulations, about 600 per year according to OAL, and these are done by California's more than 200 state agencies, departments, boards and commissions that have rulemaking authority.

The OAL should always have the ability to be a check on these numerous rulemaking bodies and the hundreds of regulatory changes that they go through each year in order to ensure that these entities are properly complying with the relevant laws and regulations. By the way, yes, there are OAL regulations on the APA process. These statutory exemptions also represent an unwarranted delegation of authority being made by the Legislature to the executive branch of government.

Instead of ensuring that the Legislature remains an equal branch of state government, by granting this exemption to a regulatory agency to bypass the APA, it's my belief that the Legislature weakens its position towards its otherwise coequal branch the executive branch of state government.

When state agencies engage in quasi-legislative activities, then those rulemaking efforts should have an appropriate check and balance as well as the appropriate public notice and participation in that rulemaking activity. Thanks for joining this podcast.