

REGULATIONS



One of the many challenges California retailers face includes complying with voluminous, complex and often costly sets of regulations. Rules set forth by state and regional regulatory bodies can have as much impact on our operations as bills in the Legislature. Despite efforts to rein-in and rationalize administrative rulemakings, California remains a challenging regulatory environment for business and is frequently ranked near the bottom in business climate surveys.

Administrative boards and agencies play an important role in defining and implementing laws passed by the Legislature, but they are unelected and largely unaccountable to the public and, therefore, are not appropriate venues for making substantial policy decisions. They also tend to be partial to the specific mission of their agency (“workplace safety”, “recycling”, etc.) rather than the balancing of policy trade-offs and interests.



EXISTING PROCESSES TO REDUCE DUPLICATIVE RULES AND ECONOMIC IMPACT

The Legislature has taken some steps to improve California’s system of adopting regulations. Key measures include:

- The Administrative Procedure Act (APA) allows the public to have input into the rulemaking process and requires the Office of Administrative Law (OAL) to review proposed regulations to make sure they are clear, necessary and legally valid.

- Since 2011, the Legislature has required a Standardized Regulatory Impact Analysis (SRIA) for all “major regulations” with an anticipated cost of \$50 million or more. Major regulations must go through an economic assessment and evaluation of whether there are more cost-effective and equally effective alternatives. Many business groups, including retailers, are concerned that over time the SRIA process is losing rigor and that economic analyses can be inadequate.

DELEGATIONS OF AUTHORITY

The California Constitution prohibits “delegations of authority” by the Legislature when they fail to make fundamental policy decisions, provide adequate standards or adequate safeguards against arbitrary rules or favoritism.

Examples of broad delegations of Legislative authority:

- The Legislature tends to establish aggressive environmental standards and delegate broad authority to regulatory bodies as to how they will be achieved. The classic model is the state’s greenhouse gas (GHG) reduction regime. Under this legislation, the Air Resources Board (CARB) has sweeping authority over commercial activities that emit carbon dioxide and makes decisions about which products may legally be sold in California and which go out of business, how products and people may move around the state and other conditions of commercial operations. These decisions involve large-scale policy trade-offs that are mostly considered outside the legislative process.

- Occasionally, regulatory bodies assume lawmaking powers for themselves. As part of the COVID-19 Emergency Temporary Standard (ETS) for workplaces, the CalOSHA Standards Board adopted an “exclusion pay” requirement for employers to compensative employees an unlimited amount of paid time off for COVID illness or suspected or actual COVID exposure whether or not that exposure took place at work.

Regardless of its merits, an issue this substantial should have been decided by elected lawmakers looking at all impacts of the policy and who should pay for it.



PRIVATE RIGHTS OF ACTION.

Laws or regulations enforced by private attorneys (“private rights of action”) are a particularly challenging feature of California’s regulatory landscape. Court actions are very costly to defend, and unlike ordinary regulatory enforcement, there is no fair opportunity for a business to provide evidence of compliance at the outset and avoid the action. This is part of what makes laws like the Private Attorneys General Act (PAGA) and Proposition 65 (product labeling) so onerous.