

Fiscal Estimate Narratives

DOT 3/1/2018

LRB Number	17-5307/1	Introduction Number	SB-745	Estimate Type	Original
Description deference by courts to agency interpretations of law, notice and comment requirements for guidance documents issued by agencies, and agency rule-making authority					

Assumptions Used in Arriving at Fiscal Estimate

Under current law, the courts have identified three distinct levels of deference granted to agency decisions: great weight deference, due weight deference and de novo review. In order for an agency interpretation to be accorded "great weight" deference, all four of the following requirements must be met: (1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute. When a reviewing court applies great weight deference, it sustains an agency's reasonable statutory interpretation, even if the court concludes that another interpretation is equally reasonable, or even more reasonable, than that of the agency. "Due weight" deference is appropriate when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court. The deference allowed an administrative agency under due weight is not so much based upon its knowledge or skill as it is on the fact that the legislature has charged the agency with the enforcement of the statute in question. A "de novo" standard of review, where no weight is given to an agency decision, is only applicable when the issue before the agency is clearly one of first impression, or when an agency's position on an issue has been so inconsistent so as to provide no real guidance to the court. Under a de novo review, the trial court may receive testimony and other evidence and is not limited to a review of the agency's record of decision.

This bill will increase costs to the Department in two ways. First, defense of an agency decision is currently aimed at the agency's expertise, experience, and consistency, intending to prove the highest level of deference that a court should give to the agency decision. With no deference given, any defense will likely shift, at least as far as the agency is concerned, to gathering evidence of why a particular decision was made, why others were rejected, and the facts and circumstances that were considered and the weight given by the agency to various factors in its decision-making process. Although the Department of Justice is responsible for defending the agency, the defense will necessarily involve fact-finding at the agency. Next, affording no deference to an agency decision increases the likelihood that a court will overturn or modify the agency's decision. This will increase costs by requiring the agency to modify rules, develop and implement new practices and forms and re-training staff to be consistent with the court's interpretation.

The amount of these increased costs cannot be calculated. First, it cannot be known how much litigation will result from this bill so the agency costs for discovery cannot be known. Next, if a rule or a program is completely overturned by a court the agency's implementation costs will be doubled or more, as the agency could be required to completely reconstruct the interpretation, program or rule, but where a court makes only modest changes to an agency's interpretation the cost increase would be correspondingly smaller.

The agency is unaware of having issued any "guidance documents" subject to this bill and therefore anticipates no costs associated with the provisions of the bill relating to guidance documents.

Long-Range Fiscal Implications

This bill will increase costs but the extent cannot be determined.