# New Year, New Laws: Now What?

BY ELLIOT ANDERSON, ESQ.

**On January 1, many new Nevada laws went into effect. These laws run the gamut, including health care, education, commerce, employment, and the like. But enactment is just the end of the beginning; new laws usually do not implement themselves. While serving as a Nevada legislator, I learned valuable lessons about state agencies. For example, without agencies implementing legislation, these laws often have no practical effect.**

As a result, I learned that legislators must follow their legislation, lest these laws become an academic exercise, by developing relationships with agency leaders. These relationships help ensure that agencies (1) implement new legislation (never a given), and (2) implement it correctly.

Otherwise, challenging an agency's implementation (or inaction) can be difficult. Nevada administrative law provides a variety of tools and remedies to ensure that laws are faithfully implemented. It also provides tools to challenge an incorrect – or illegal – implementation. This article briefly surveys these tools. Still, a word of caution: These litigation tools should be exercised only after (1) exhausting administrative remedies, (2) participating in rulemaking, hearings, and workshops, or by (3) informal conversations with the implementing agency. Without exhaustion, the law will often bar relief. *See Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007) ("[A] person generally must exhaust all available administrative remedies before initiating a lawsuit … "). Without informal resolution, litigants may spend money unnecessarily and burn valuable bridges with agencies.

That said, informal resolution often does not work. Agencies sometimes need a push for various reasons: (1) bureaucratic inertia, (2) lack of funding/administrative resources, (3) lack of understanding, or (4) political considerations. And sometimes, without a credible threat of litigation, agencies

may not believe they need to engage. Given this unfortunate reality, any administrative law practitioner must stand ready to exercise all available legal tools. These tools allow litigants to challenge agency action and inaction.

## Agency Action

Do you oppose new legislation or disagree with the agency's enabling regulations? In that case, NRS 233B, the Nevada Administrative Procedure Act (APA) should be your destination. The Legislature enacted NRS 233B in 1965, based in part on the Model State Administrative Procedure Act of 1961. 1965 Nev. Stat., ch. 362, §§ 5, 12 at 963, 965; *State Dep't of Health & Hum. Servs., Div. of Pub. & Behav. Health Med. Marijuana Establishment Program v. Samantha Inc.*, 133 Nev. 809, 814, 407 P.3d 327, 330 (2017) ("Samantha, Inc."). Because generally, to challenge agency *action*, "[t]he availability of a legal remedy depends on the statutes comprising the … [APA] and the agency-specific statutes involved." *Samantha Inc.*, 133 Nev. at 811, 407 P.3d at 329; *Crane v. Cont'l Tel. Co.,* 105 Nev. 399, 401, 775 P.2d 705, 706 (1989) ("When the legislature creates a specific procedure for review of administrative agency decisions, such procedure is controlling."). Thus, the Nevada Supreme Court generally limits its regulatory review to evaluation allowed by the Nevada APA. *See Killebrew, Tr. of Killebrew Revocable Tr.*, 5TH ADM 1978 v. *Donohue*, 139 Nev. Adv. Op. 43 (2023) (retreating from prior decisions authorizing arbitrary and capricious regulatory review because of "the distinct lack of language in NRS 233B.110 authorizing arbitrary and capricious review.").

The Nevada APA vests courts with statutory power to review agency regulations. NRS 233B.110(1) ("The validity or applicability of any regulation may be determined … when it is alleged that the regulation, or its proposed application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff."). Under the Nevada APA, "[a]n agency makes a rule when it does nothing more than state its official position on how it interprets a requirement already provided for and how it proposes to administer its statutory function." *Coury v. Whittlesea-Bell Luxury Limousine*, 102 Nev. 302, 305, 721 P.2d 375, 377 (1986). In other words, the Nevada APA broadly defines a "regulation" subject to judicial review. *E.g.*, NRS 233B.038(1) ("'Regulation' means: (a) [a]n agency rule, standard, directive *or* statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency … " (emphasis added)). Nevada courts may declare a "regulation invalid if [they] find [] that it violates constitutional or statutory provisions or exceeds the statutory authority of an agency." NRS 233B.110. The Nevada APA also appears to give courts the power to review regulations for reasonableness. NRS 233B.040(1) ( "To the extent authorized by the statutes applicable to it, each agency may adopt *reasonable regulations* to aid it in carrying out the functions assigned to it by law." (emphasis added)); *Villa v. Arrizabalaga*, 86 Nev. 137, 140, 466 P.2d 663, 665 (1970) (reciting that regulations must be reasonable and striking down regulation that impliedly conflicted with statutory scheme).

Challenging express agency action may be difficult absent a clear violation of statutory or constitutional authority. *See State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co*., 116 Nev. 290, 293, 995 P.2d 482, 485 (2000), ("[ ] a court will not hesitate to declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency … "), *abrogated on other grounds by Killebrew, Tr.,* 139 Nev. Adv. Op. 43. In particular, reasonableness review seems difficult to conceptualize in practice given the Nevada Supreme Court's stated deference to legislative policymaking. *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 80 Nev. 483, 500, 396 P.2d 683, 692 (1964); *see also* Nev. Const. art. III, § 1 (allowing the Legislature to approve and authorize the adoption of regulations). It is also an open – and muddled – question what deference the judicial branch owes an agency when it interprets an agency's statutory scheme. *Compare Wynn Las Vegas, L.L.C. v. Baldonado,* 129 Nev. 734, 738, 311 P.3d 1179, 1182 (2013) ("This court defers to an 'agency's interpretation of its governing statutes or regulations if the interpretation is within the [statute's or regulation's language].'" *(alterations in original)*); *with Manke Truck Lines, Inc. v. Pub. Serv. Comm'n of Nev.*, 109 Nev. 1034, 1036–37, 862 P.2d 1201, 1203 (1993) (holding that statutory construction is a "pure [ ] legal issue … reviewed without any deference whatsoever to the conclusions of the agency."). In addition, the Nevada Supreme Court has relied on "the Legislature's acquiescence in an agency's reasonable interpretation" to rule against such challenges. *Sierra Pac. Power Co. v. Dep't of Tax'n,* 96 Nev. 295, 298, 607 P.2d 1147, 1149 (1980).

In sum, the Nevada APA is the primary basis to challenge agency action.


## Agency Inaction

Do you support new legislation and want to see it implemented? In some cases, attorneys must utilize other equitable or extraordinary remedies to challenge agency *inaction*, like mandamus or an affirmative injunction. "[a] party seeking to challenge an administrative agency's decision may pursue such judicial review as is available by statute or, if appropriate, equitable relief." *Samantha Inc.*, 133 Nev. at 811, 407 P.3d at 329. These remedies fill in a legal gap in judicial power over agency inaction. *Compare Crane,* 105 Nev. at 401, 775 P.2d at 706

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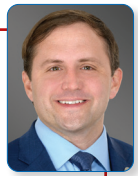
("Courts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review."), *with* Richard J. Pierce Jr., *Administrative Law Treatise,* 1700 (5th ed. 2010) ("[Equitable remedies] have become the most common nonstatutory remedies for unlawful agency action.").

Equitable and extraordinary relief is only available in carefully limited situations. For example, this relief depends on the absence of an adequate legal remedy. *Samantha Inc.*, 133 Nev. at 811-12, 407 P.3d at 329 (*quoting* Pierce, *supra*, at 1701). As for extraordinary writ relief, a petitioner must generally show a clear legal duty for the agency to act. *See Walker v. Second Jud. Dist. Ct.*, 136 Nev. 678, 680, 476 P.3d 1194, 1196 (2020). To be sure, other grounds for writ relief, like a manifest abuse of discretion, are available. *Id.* Even so, this type of mandamus may be less favorable and tougher to obtain when dealing with agency rulemaking or policymaking. *See also Zale-Las Vegas, Inc.*, 80 Nev. at 500, 396 P.2d at 692 ("The disposition of the judicial branch of government has always been to scrupulously refrain from encroaching in the slightest way into the legislative field of policymaking where factual or economic factors require latitude of discretion." (internal quotations omitted)).

Typically, these tools will be a primary way to force an agency to act.

Challenging agency action and inaction can be difficult – but important. Nevada administrative agencies take center stage in Nevada government. They occupy an especially prominent role given Nevada's limited 120-day biennial Legislature. Without these important tools, this power, in practice, can be difficult to check. Nevada businesses – in particular – should understand this legal framework.



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