



WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

2011 Wisconsin Act 21
[January 2011 Special Session
Assembly Bill 8]

Administrative Rules

2011 Wisconsin Act 21 makes changes to statutes that relate to the promulgation of administrative rules, including changes relating to agency authority to promulgate rules; gubernatorial approval of statements of scope and final drafts of proposed rules; economic impact analyses; legislative review of proposed rules; and venue in judicial review actions related to the validity or invalidity of administrative rules.

Agency Authority to Promulgate Rules and Implement Standards

Act 21 provides that no agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by rule. The Act also allows the Governor, by executive order, to prescribe guidelines to ensure that rules are promulgated in compliance with subch. II of ch. 227, Stats.

Further, the Act provides that all of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

- A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the Legislature.
- A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the Legislature.
- A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard,

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature's Web site at: <http://www.legis.state.wi.us/>.

requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

Gubernatorial Approval of Statements of Scope

Act 21 requires that an agency submit a statement of the scope of a proposed rule to the Governor and, as required by law prior to Act 21, to the individual or body with policy-making powers over the subject matter of the proposed rule for approval. The agency may not send the scope statement to the Legislative Reference Bureau (LRB) for publication until the Governor issues a written notice of approval of the statement. In addition, the Act prohibits a state employee or official from performing any activity in connection with the drafting of a proposed rule, except for an activity necessary to prepare the scope statement, until the Governor and the individual or body with policy-making powers over the subject matter of the proposed rule approve the statement.

Further, the Act requires that if an agency changes the scope of the proposed rule in any meaningful or measurable way, the agency must prepare and obtain approval of a revised scope statement in the same manner as the original statement was prepared and approved. No state employee or official may perform any activity in connection with the drafting of the proposed rule, except for an activity necessary to prepare the revised scope statement, until the revised scope statement is approved.

Economic Impact Analyses

Act 21 requires that an agency prepare an economic impact analysis for a proposed rule before submitting the rule to the Legislative Council staff for review by the Rules Clearinghouse. An economic impact analysis must contain information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state's economy as a whole. When preparing the analysis, the agency must solicit information and advice from businesses, associations representing businesses, local governmental units, and individuals that may be affected by the proposed rule. The agency must prepare an economic impact analysis in coordination with local governmental units that may be affected by the proposed rule. The agency may request information that is reasonably necessary for the preparation of an economic impact analysis from other businesses, associations, local governmental units, and individuals and from other agencies. The economic impact analysis must include all of the following:

- An analysis and quantification of the policy problem that the proposed rule is intending to address, including comparisons with the approaches used by the federal government and by Illinois, Iowa, Michigan, and Minnesota to address that policy problem and, if the approach chosen by the agency to address that policy problem is different from those approaches, a statement as to why the agency chose a different approach.
- An analysis and detailed quantification of the economic impact of the proposed rule, including the implementation and compliance costs that are reasonably expected to be incurred by or passed along to the businesses, local governmental units, and individuals that may be affected by the proposed rule.
- An analysis of the actual and quantifiable benefits of the proposed rule, including an assessment of how effective the proposed rule will be in addressing the policy problem that the rule is intended to address.
- An analysis of alternatives to the proposed rule, including the alternative of not promulgating the proposed rule.

- A determination made in consultation with the businesses, local governmental units, and individuals that may be affected by the proposed rule as to whether the proposed rule would adversely affect in a material way the economy, a sector of the economy, productivity, jobs, or the overall economic competitiveness of the state.

Act 21 requires that an agency submit the economic impact analysis and any revised economic impact analysis to the Legislative Council staff, the Department of Administration (DOA), the Governor, and the Chief Clerk of each house of the Legislature. This must be done on the day that the proposed rule is submitted to the Legislative Council staff for review by the Rules Clearinghouse.

Further, *Act 21* requires that if a proposed rule is modified after the economic impact analysis is submitted so that the economic impact of the proposed rule is significantly changed, the agency must prepare a revised economic impact analysis for the proposed rule as modified. A revised economic impact analysis must be prepared and submitted in the same manner as an original economic impact analysis is prepared and submitted.

If an economic impact analysis regarding a proposed rule indicates that a total of \$20,000,000 or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses, local governmental units, and individuals as a result of the proposed rule, the Act requires that DOA review the proposed rule and issue a report. The agency may not submit a proposed rule to the Legislature for review until the agency receives a copy of DOA's report and the approval of the DOA Secretary. The report must include all of the following findings:

- That the economic impact analysis is supported by related documentation contained or referenced in the economic impact analysis.
- That the agency has statutory authority to promulgate the proposed rule.
- That the proposed rule, including any administrative requirements, is consistent with and not duplicative of other state rules or federal regulations.
- That the agency has adequately documented the factual data and analytical methodologies that the agency used in support of the proposed rule and the related findings that support the regulatory approach that the agency chose for the proposed rule.

Lastly, *Act 21* requires that the Legislative Council staff include, or provide a link to, the economic impact analysis and any revised economic impact analysis on its administrative rules Internet site. A notice of a hearing on a proposed rule must include the economic impact analysis and any report prepared by DOA, or a summary of that analysis and report and a description of how a copy of the full analysis and report may be obtained from the agency at no charge.

Gubernatorial Approval of Final Drafts of Proposed Rules

Act 21 requires that an agency submit a proposed rule that is in final draft form to the Governor for approval. The Governor may approve or reject the proposed rule, and, if the Governor approves a proposed rule, he or she must provide the agency with a written notice of that approval. A proposed rule may not be submitted to the Legislature for review unless the Governor has approved the proposed rule in writing.

Legislative Review of Proposed Rules

Act 21 provides that a notice of a proposed rule that is received by the Legislature for committee review after the last of the Legislature's final general-business floorperiod in the biennial session will be

considered received on the first day of the next regular session of the Legislature, unless the presiding officers of both houses direct referral of the notice and report before that day.

Act 21 provides that if a notice and report is received by the Legislature after the last day of the Legislature's final general-business floorperiod and is referred for committee review before the first day of the next regular session of the Legislature, the committee review period for each committee extends to the day that the next Legislature convenes.

In addition, *Act 21* provides that when a committee's jurisdiction over a proposed rule is concluded, the committee must report the proposed rule and any objection to the Joint Committee for Review of Administrative Rules (JCRAR). The review period for JCRAR is 30 days, unless extended by action of the JCRAR Co-Chairs, after the last referral of a proposed rule and any objection to JCRAR. During that review period, JCRAR *may* take any action on the proposed rule in whole or in part. JCRAR *must* meet and take action during that period with respect to any proposed rule or any part of a proposed rule to which a committee has objected and *may* meet and take action during that period with respect to any proposed rule or any part of a proposed rule to which no committee has objected.

However, if a notice and report is received by the Legislature after the last day of the Legislature's final general-business floorperiod and is referred for committee review before the first day of the next regular session of the Legislature, *Act 21* provides that the review period for JCRAR extends to the day that the next Legislature convenes. During that review period, JCRAR may meet and take action on the proposed rule in whole or in part. If JCRAR meets in executive session with respect to a proposed rule or part of a proposed rule to which a committee has objected, JCRAR must take action with respect to the committee's objection.

Further, *Act 21* provides that if a committee or JCRAR has not concluded its jurisdiction over a proposed rule or a part of a proposed rule before the day that the next Legislature convenes, that jurisdiction ceases and the proposed rule or part of the proposed rule is referred to the appropriate standing committee or JCRAR of the next Legislature, which begins a new committee review period.

Lastly, *Act 21* prohibits an agency from promulgating a proposed rule or a part of a proposed rule until the end of the JCRAR review period or until JCRAR nonconcur in the objection of a committee, concurs in the approval of the committee, otherwise approves the proposed rule or part of the proposed rule, waives its jurisdiction over the proposed rule or part of the proposed rule, or until a bill introduced to prevent promulgation of the proposed rule fails to be enacted.

Emergency Rules

Act 21 requires that an agency prepare a statement of the scope of a proposed emergency rule and obtain approval of the statement by the Governor and the individual or body with policy-making powers over the subject matter of the emergency rule. If the agency changes the scope of a proposed emergency rule, the agency must prepare and obtain approval of a revised scope statement. In addition, the Act requires that an agency submit a proposed emergency rule in final draft form to the Governor for approval. The Governor may approve or reject a proposed emergency rule. If the Governor approves a proposed emergency rule, the Governor must provide the agency with a written notice of that approval.

In addition, *Act 21* provides that economic impact analyses are not required for emergency rules.

Judicial Review of Administrative Rules

Act 21 provides that the exclusive means of judicial review of the validity of a rule is an action for declaratory judgment as to the validity of the rule brought in the circuit court for the county where the party asserting the invalidity of the rule resides or has its principal place of business or, if that party is a

nonresident or does not have its principal place of business in this state, in the circuit court for the county where the dispute arose.

Act 21 requires that when a circuit court enters a final order in a declaratory judgment action on the validity of a rule, the court must notify the LRB of the court's determination as to the validity or invalidity of the rule. The LRB must publish a notice of that determination in the Wisconsin Administrative Register and insert an annotation of that determination in the Wisconsin Administrative Code.

Initial Applicability

- Agency authority. The provisions of Act 21 relating to agency authority to promulgate rules first apply to a proposed rule submitted to the Legislative Council staff for review on the effective date of the Act.
- Governor's approval of scope statement. The provisions of Act 21 relating to approval by the Governor of the statement of scope for a proposed rule or emergency rule first apply to a proposed rule or emergency rule whose statement of scope is submitted on the effective date of the Act.
- Economic impact analysis. The provisions of Act 21 relating to preparation and submission of an economic impact analysis first apply to a proposed rule submitted to the Legislative Council staff for review on the effective date of the Act.
- Governor's approval of final draft rule. The provisions of Act 21 relating to approval by the Governor of a final draft rule or emergency rule first apply to a proposed rule or emergency rule whose scope statement is presented to the Governor for approval on the effective date of the Act.
- Legislative review of final draft rules. The provisions of Act 21 relating to legislative committee review of final draft rules first applies to a proposed rule submitted to the Legislature for referral to standing committees on the effective date of the Act.
- Venue in action challenging validity of rule. The provisions of Act 21 relating to venue in declaratory judgment actions first applies to an action for declaratory judgment commenced on the effective date of the Act.

Effective date: Act 21 takes effect on June 8, 2011.

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