

Fiscal Estimate Narratives

DPI 6/27/2017

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| LRB Number | 17-3287/1 | Introduction Number | SB-322 | Estimate Type | Original |
| Description review by state agencies of administrative rules and enactments; an expedited process for repealing rules an agency no longer has the authority to promulgate; retrospective economic impact analyses for rules; and reporting by the Legislative Reference Bureau on rules in need of revision | | | | | |

Assumptions Used in Arriving at Fiscal Estimate

For the purpose of this analysis, the Department of Public Instruction will focus on the provisions that directly impact the Department with respect to rulemaking.

CURRENT LAW

Current law sets forth the procedure for promulgating administrative rules. Generally, that procedure consists of the following steps:

1. The agency planning to promulgate the rule prepares a statement of the scope of the proposed rule, which must be approved by the governor and the agency head before any state employee or official may perform any activity in connection with the drafting of the proposed rule.
2. The agency drafts the proposed rule, together with an economic impact analysis, plain-language analysis, and fiscal estimate for the proposed rule, and submits those materials to the Legislative Council Staff for review.
3. Subject to certain exceptions, a public hearing is held on the proposed rule.
4. The final draft of the proposed rule is submitted to the governor for approval.
5. The final draft of the proposed rule, together with the economic impact analysis, plain-language analysis, and fiscal estimate for the proposed rule, are submitted to the legislature for review by one standing committee in each house and by the Joint Committee for Review of Administrative Rules (JCRAR).
6. The proposed rule is filed with the Legislative Reference Bureau (LRB) for publication in the Wisconsin Administrative Register, and, subject to certain exceptions, the rule becomes effective on the first day of the first month beginning after publication of the revised chapters of the Wisconsin Administrative Code (code).

THE BILL

Expedited procedure for repealing unauthorized rules

This bill provides for an alternate, expedited procedure an agency can use to repeal a rule that the agency determines it no longer has the authority to promulgate because of the repeal or amendment of the law that previously authorized its promulgation (unauthorized rule). Under the bill, an agency, instead of using the procedure described above, may promulgate a rule that repeals an unauthorized rule using the following procedure:

1. The agency submits a petition with a proposed rule that repeals a rule the agency has determined is an unauthorized rule to the Legislative Council Staff for review, along with certain information and a statement that the agency is petitioning JCRAR to use the expedited procedure to repeal a rule the agency has determined to be an unauthorized rule.
2. The Legislative Council Staff reviews the petition and proposed rule and submits to JCRAR the petition and proposed rule with a written report that includes a statement of the Legislative Council Staff's determination of whether the proposed rule proposes to repeal an unauthorized rule.
3. Following receipt of the petition and proposed rule submitted by the Legislative Council Staff, JCRAR reviews the petition and proposed rule and may 1) approve the agency's petition if JCRAR determines that the proposed rule would repeal an unauthorized rule; 2) deny the petition; or 3) request that the agency make changes to the proposed rule and resubmit the petition and proposed rule as described above. If JCRAR approves the petition, the agency must promulgate the proposed rule to repeal the unauthorized rule by filing a certified copy of the rule with the LRB, together with a copy of JCRAR's decision.

Agency review of rules

The bill requires each agency with any rules published in the code to biennially submit a report to JCRAR listing all of the following rules promulgated or otherwise administered by that agency:

1. Unauthorized rules.
2. Rules for which the authority to promulgate has been restricted.
3. Rules that are obsolete or that have been rendered unnecessary.
4. Rules that are duplicative of, superseded by, or in conflict with another rule, a state statute, a federal statute or regulation, or a court ruling.
5. Economically burdensome rules.

The report must also include 1) a description of the agency's actions, if any, to address each rule listed in the report and, if the agency has not taken any action to address a rule listed in the report, an explanation for not taking action; 2) a description of the status of each rule listed in the previous year's report not otherwise listed; and 3) if the agency determines that there are no such rules to list, a statement of that determination.

If an agency identifies an unauthorized rule in the report, the bill requires the agency to submit a petition to repeal the unauthorized rule, using the process described above, within 30 days after the report.

Agency review of legislative enactments

The bill requires agencies to review enactments of the legislature (acts) to determine whether any part of an act results in any of the following consequences:

1. Eliminates or restricts the agency's authority to promulgate any of the agency's rules.
2. Renders any of the agency's rules obsolete or unnecessary.
3. Renders, for any reason, any of the agency's rules not in conformity with or superseded by a state statute, including due to statutory numbering or terminology changes in the act.
4. Requires or otherwise necessitates rule making by the agency.

If an agency determines that any such consequence results from an act, within six months after the act's effective date, the agency must do one or more of the following, as applicable, to address any consequence identified by the agency:

1. Submit a statement of the scope of a proposed rule to address any such consequence to the governor, unless the act requires otherwise or unless the agency submits a notice to JCRAR explaining why it is unable to submit the statement of scope within that time period and an estimate of when the agency plans to submit the statement of scope.
2. Submit a petition to use the expedited procedure described above for repealing an unauthorized rule to the Legislative Council Staff.
3. Submit a request to the LRB for the LRB to use its revision authority to make certain changes to the code.

Biennial report by Legislative Reference Bureau

The bill requires the LRB to biennially report to JCRAR regarding rules in the code that the LRB has identified as possibly being in need of revision.

Retrospective economic impact analyses for existing rules

The bill allows JCRAR to direct an agency to prepare a retrospective economic impact analysis for any of an agency's rules that are published in the code. JCRAR may identify one or more specific chapters, sections, or other subunits in the code that are administered by the agency as the rules that are to be the subject of the analysis and may specify a deadline for the preparation of the analysis. An agency must include in a retrospective economic impact analysis a comparison of the actual economic effect of the rules to any economic impact analysis that analyzed the economic effect of the rules when they were proposed. The bill otherwise requires an agency to prepare a retrospective economic impact analysis in a manner similar to that prescribed for an economic impact analysis for a proposed rule.

State:

Currently, the Department designates an administrative rules coordinator, and employs an Office of Legal Services for the purpose of working with program staff to promulgate administrative rules (among other duties performed by the Office of Legal Services for the Department). Rules are drafted in accordance with changes in statutes and/or practice. It takes a significant amount of staff hours to promulgate a rule, depending on the type of rule and subject matter, in accordance with a process that currently takes about nine months to a year to complete. Rules are often revisited as the underlying statutes affecting the rule's subject matter change on a regular basis.

One provision of the bill requires state agencies to review enactments of the Legislature to determine whether any part of an act affects the Department's rulemaking authority or necessitates rulemaking by the agency. It is not possible to anticipate how future legislative enactments could impact the Department's rulemaking authority or its current rules. However, the Department already has a process for identifying changes in rulemaking in the event statutes governed by the Department are amended. If it determines

that rulemaking is required in accordance with changes in statutes, the Department will submit a scope statement indicating its intentions to amend a rule. Because the bill codifies what is already an existing practice for the Department, there is no fiscal impact as a result of this provision in the bill.

Further, the bill will cause the Department to increase its workload in order to prepare the report concerning unauthorized, obsolete or unnecessary rules. Recently, the Department had conducted a review of approximately 22 of its rule chapters in accordance with the Assembly's Red Tape Review and estimated that it took around 8 hours of staff time, per rule, to complete a thorough review of each rule chapter. Because 44 rule chapters are currently in effect in the DPI administrative code, it can be estimated that it would take as much as 352 hours of staff time every two years to conduct the review of every rule to comply with this bill. Some of these tasks may already be completed for some rules when changes in statutes necessitate rulemaking before the close of the two-year period, but that cannot be anticipated at this time. It is possible that an expedited process to repeal rules that are rendered obsolete may result in a greater volume of rules being repealed in a shorter amount of time, but it is unclear whether such a provision could result in a net savings in terms of resources and staff time necessary to conduct rulemaking.

Finally, the Department may be required to prepare a retrospective economic impact analysis for its rules or specific subunits of rule upon the request of JCRAR. Requests to complete such economic impact analyses may vary in size and scope, so it is not possible to determine how much staff time would be required to complete such a request. Therefore, the fiscal impact to the state (and directly on the Department) as a result of this bill is indeterminate.

Local:

Because it is unclear which administrative rules governed by the Department could be impacted by this legislation, the local fiscal impact as a result of this bill is indeterminate.

Long-Range Fiscal Implications