

Fiscal Estimate - 2017 Session

☒ Original ☐ Updated ☐ Corrected ☐ Supplemental

| | | | |
|--|--|--|--|
| LRB Number 17-5307/1 | | Introduction Number SB-745 | |
| Description deference by courts to agency interpretations of law, notice and comment requirements for guidance documents issued by agencies, and agency rule-making authority | | | |
| Fiscal Effect State: <div style="display: flex; flex-wrap: wrap;"><div style="width: 50%;"><input type="checkbox"/> No State Fiscal Effect <input checked="" type="checkbox"/> Indeterminate <input type="checkbox"/> Increase Existing Appropriations <input type="checkbox"/> Decrease Existing Appropriations <input type="checkbox"/> Create New Appropriations</div><div style="width: 50%;"><input type="checkbox"/> Increase Existing Revenues <input type="checkbox"/> Decrease Existing Revenues <div style="margin-top: 10px;"><input checked="" type="checkbox"/> Increase Costs - May be possible to absorb within agency's budget <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Decrease Costs</div></div></div> Local: <div style="display: flex; flex-wrap: wrap;"><div style="width: 60%;"><input type="checkbox"/> No Local Government Costs <input type="checkbox"/> Indeterminate 1. <input type="checkbox"/> Increase Costs 3. <input type="checkbox"/> Increase Revenue <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory 2. <input type="checkbox"/> Decrease Costs 4. <input type="checkbox"/> Decrease Revenue <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory</div><div style="width: 40%; padding-left: 10px;">5. Types of Local Government Units Affected <div style="display: flex; flex-wrap: wrap;"><div style="width: 33%;"><input type="checkbox"/> Towns <input type="checkbox"/> Counties <input type="checkbox"/> School Districts</div><div style="width: 33%;"><input type="checkbox"/> Village <input type="checkbox"/> Others <input type="checkbox"/> WTCS Districts</div><div style="width: 33%;"><input type="checkbox"/> Cities</div></div></div></div> | | | |

Fiscal Estimate Narratives

DPI 2/12/2018

| | | | | | |
|---|-----------|---------------------|--------|---------------|----------|
| 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

This bill 1) prohibits a court from according deference to agency interpretations of law in certain proceedings and prohibits agencies from seeking deference in any proceeding to agency interpretations of law; 2) establishes various requirements with respect to the adoption and use of guidance documents by agencies, including requirements that agencies must comply with in order to adopt guidance documents; and 3) provides that settlement agreements do not confer rule-making authority.

Agency interpretations of law

Generally under current law, when reviewing an agency decision in a contested case or other matter subject to judicial review under the law governing administrative procedure for state agencies, a court must accord due weight to the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The bill limits this directive such that a court performing judicial review of such a decision must accord no deference to an agency's interpretation of law.

The bill also provides that no agency may seek deference in any proceeding based on the agency's interpretation of any law.

Guidance documents

Subject to various exceptions, the bill defines "guidance document" as any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that 1) explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency; or 2) provides guidance or advice with respect to how the agency is likely to apply any statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

The bill requires each agency, no less than 21 days before adopting a guidance document, to post the proposed guidance document on the agency's Internet site and submit it to the Legislative Reference Bureau for publication in the register and to provide a period for persons to submit written comments to the agency on the proposed guidance document. The agency must retain all written comments submitted during the public comment period and consider those comments in determining whether to adopt the guidance document as originally proposed, modify the proposed guidance document, or take any other action. The bill allows for a comment period of less than 21 days with the approval of the governor. The bill also requires each adopted guidance document, while valid, to remain available on the agency's Internet site and requires the agency to permit continuing public comment on the guidance document. Each guidance document must be signed by the head of the agency below a statement containing certain certifications.

The bill provides that a guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any license. An agency that proposes to rely on a guidance document to the detriment of a person in any proceeding must afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the guidance document, and an agency may not use a guidance document to foreclose consideration of any issue raised in the guidance document. The bill also contains other provisions with respect to agency use of and reliance upon guidance documents, and allows certain persons to petition an agency to promulgate a rule in place of a guidance document.

The bill also provides that any action or inaction by an agency related to the requirements of the bill

regarding guidance documents constitutes a decision subject to judicial review under the law governing administrative procedure for state agencies.

The bill provides that on July 1, 2018, any guidance document that does not comply with the requirements in the bill is considered to be rescinded.

Agency rule-making authority; settlement agreements

The bill provides that a settlement agreement, consent decree, or court order does not confer rule-making authority and cannot be used by an agency as authority to promulgate rules. The bill provides that no agency may agree to promulgate a rule as a term in any settlement agreement, consent decree, or stipulated order of a court unless the agency has explicit statutory authority to promulgate the rule at the time the settlement agreement, consent decree, or stipulated order of a court is executed.

Local:

Under the bill, aggrieved individuals are given the opportunity to contest the legality of guidance issued by the Department and are entitled to judicial review of agency decisions. Eligible individuals under Wis. Stat. § 227.12, including municipalities (i.e., school districts) are also able to petition the Department to promulgate a rule in place of any guidance document. However, the formal requirements associated with issuing a guidance document under this bill may negatively impact regulated individuals and/or local governments.

Each team at the Department issues bulletins and documents that assist individuals, school districts, and others in complying with program requirements. For example, school districts often ask the Department for guidance on school finance issues, while individuals often contact the Department for guidance in obtaining or maintaining educator licensure. The formal requirements created by this bill will likely cause delays in issuing this guidance and will prevent the Department from responding to these requests in a timely manner. Delays in issuing this guidance may negatively impact a school district or individual's ability to comply with requirements associated with various programs and may result in higher costs for affected individuals. Because it is unclear which guidance documents issued by the Department could be impacted by this legislation, the local fiscal impact as a result of this bill is indeterminate.

State:

State agencies, including the Department of Public Instruction, would likely experience a significant increase in workload in order to comply with the changes associated with the issuance of guidance documents. This includes guidance documents that the Department intends to issue or those that have been issued prior to the July 1, 2018 date on which previous guidance that does not comply with the notice, comment, publication, and certification requirements is deemed rescinded. It is not clear what rescission means in the case of guidance documents, because, as stated in the bill, guidance documents already do not carry the force of law similar to that of statutes or rule. The Department would likely have to take an inventory of existing guidance documents and ensure that they have been appropriately adopted to prevent rescission. Further, the Department would be required to develop a new system for development of guidance documents in order to ensure that future documents comply with the new requirements of the bill, including signatory approval by the Superintendent of Public Instruction.

The Department implements numerous programs as required by statute and federal law that may be impacted by this bill. As stated above, the Department issues bulletins and documents and is often asked for guidance by individuals and school districts on matters of program compliance including, but not limited to, school finance, educator licensure, curriculum development, school and student data, school choice, school nutrition, English learners, early childhood, gifted and talented, and various federal programs, all of which may be challenged by an affected party under this bill. The opportunity for challenge and the added formal requirements of this bill are likely to result in significant delays in the issuance of critical guidance to assist affected parties in meeting program requirements. However, it is not possible to estimate in total how many previously issued guidance documents may be impacted by this bill, nor is it possible to estimate how many new guidance documents will be issued following the hypothetical passage of this bill. Because guidance does not have the force of law and an agency's interpretation of the law may not be relied upon in contested cases under this bill, were the Department challenged on the legality or the wisdom of its position taken in a guidance document, the Department may be required to adjust its practices in order to meet the terms required by the court in a settlement.

Alternatively, in the case of the petition procedures established under the bill, the Department may be

petitioned to direct its resources to promulgate a rule in place of a guidance document. 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 assigned to and performed by the Office of Legal Services for the Department). Rules are drafted in accordance with changes in statute and/or practice. It takes a significant amount of staff hours to promulgate a rule, depending on the type of rule and subject matter, through a process that currently takes about nine months to a year to complete. This process includes the scheduling and provision of notice of public hearings and comment periods on proposed rules. Rules are often revisited as the underlying statutes affecting the rule's subject matter change on a regular basis. It is likely that many of these activities would still have to be conducted as a result of the formal process required for issuing guidance documents as a result of this bill. In order to continue to conduct these activities as well as maintain a system for the Department's other administrative functions, including gathering and publishing guidance documents as well as noticing comment periods for such documents, it is not likely that the Department will be able to carry out these duties as provided in this bill with its existing resources, and may need an additional position to do comply with the provisions of the bill. The Department estimates an annualized amount of \$79,000 for the salary, fringe benefit, and related supplies and services costs of a position to coordinate the review of guidance documents and associated public comment period, review of public comments, etc.

It should also be noted that the removal of deference in judicial review of agency decisions will create significant issues on a variety of fronts, including matters of public safety (e.g., being able to successfully revoke teacher licenses), increased costs, and reduced ability to recover state funds from bad actors. Under current law, courts give three levels of deference to agency decisions: *de novo* (i.e., no deference), due weight, and great weight. Courts give more weight if agencies have consistently implemented a law over a long period of time. The thought behind this, and an idea that has been repeatedly upheld in Circuit and Supreme Court cases, is that agencies have expertise in implementing the laws they administer. By removing this deference, it means it will be more difficult for the Department's decisions to be upheld on judicial review. This means that there will be more litigation because the chances of prevailing against the Department will increase. The removal of deference to agency decisions will make it harder to prevail against, for example, teachers accused of misconduct or private schools that have defrauded the parental choice program and will result in increased costs, including inability to successfully recoup state funds, litigation costs, etc. For example, preparing a transcript of an administrative hearing for judicial review can cost between \$300-1,000.

It is unlikely such a bill would result in a net savings or efficiencies in terms of resources and staff time necessary to conduct the activities prescribed in this bill. Rather, compliance with the provisions in the bill are likely to increase costs to the state, as well as significantly slow down current agency processes, in order for the work to be performed. These potential cost increases may be the result of: the staff hours dedicated toward gathering all relevant guidance documents that meet the definition provided in this bill, making any necessary changes for said documents to meet the certification requirements provided for guidance documents, maintaining and posting guidance documents, scheduling and noticing public comment periods on guidance documents, retaining any public comment received on guidance documents and using them to determine any further action on said document before it is adopted, increased litigation in the event an individual challenges the Department's interpretation of the law, possible changes in operations in the event a court finds the Department outside its authority in implementing any program, etc. However, because each program varies in size and scope, it is not possible to determine the total costs and work hours that would be spent on the compliance with the provisions in this bill; thus, the fiscal impact to the state (and directly to the Department) as a result of this bill is indeterminate.

Long-Range Fiscal Implications

Fiscal Estimate Worksheet - 2017 Session

Detailed Estimate of Annual Fiscal Effect

☒ Original
 ☐ Updated
 ☐ Corrected
 ☐ Supplemental

| | | | | | | | | |
|---|--|--|---------------------------|-----------------------------|-------------|--------------------------------|--------------------------|-----------|
| LRB Number 17-5307/1 | Introduction Number SB-745 | | | | | | | |
| Description deference by courts to agency interpretations of law, notice and comment requirements for guidance documents issued by agencies, and agency rule-making authority | | | | | | | | |
| I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect): | | | | | | | | |
| II. Annualized Costs: | | Annualized Fiscal Impact on funds from: | | | | | | |
| | Increased Costs | Decreased Costs | | | | | | |
| A. State Costs by Category | | | | | | | | |
| State Operations - Salaries and Fringes | \$65,200 | \$ | | | | | | |
| (FTE Position Changes) | (1.0 FTE) | | | | | | | |
| State Operations - Other Costs | 13,800 | | | | | | | |
| Local Assistance | | | | | | | | |
| Aids to Individuals or Organizations | | | | | | | | |
| TOTAL State Costs by Category | \$79,000 | \$ | | | | | | |
| B. State Costs by Source of Funds | | | | | | | | |
| GPR | 79,000 | | | | | | | |
| FED | | | | | | | | |
| PRO/PRS | | | | | | | | |
| SEG/SEG-S | | | | | | | | |
| III. State Revenues - Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.) | | | | | | | | |
| | Increased Rev | Decreased Rev | | | | | | |
| GPR Taxes | \$ | \$ | | | | | | |
| GPR Earned | | | | | | | | |
| FED | | | | | | | | |
| PRO/PRS | | | | | | | | |
| SEG/SEG-S | | | | | | | | |
| TOTAL State Revenues | \$ | \$ | | | | | | |
| NET ANNUALIZED FISCAL IMPACT | | | | | | | | |
| | <u>State</u> | <u>Local</u> | | | | | | |
| NET CHANGE IN COSTS | \$79,000 | \$ | | | | | | |
| NET CHANGE IN REVENUE | \$ | \$ | | | | | | |
| <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 40%;">Agency/Prepared By</td> <td style="width: 40%;">Authorized Signature</td> <td style="width: 20%;">Date</td> </tr> <tr> <td>DPI/ Carl Bryan (608) 267-9127</td> <td>Erin Fath (608) 266-2804</td> <td>2/12/2018</td> </tr> </table> | | | Agency/Prepared By | Authorized Signature | Date | DPI/ Carl Bryan (608) 267-9127 | Erin Fath (608) 266-2804 | 2/12/2018 |
| Agency/Prepared By | Authorized Signature | Date | | | | | | |
| DPI/ Carl Bryan (608) 267-9127 | Erin Fath (608) 266-2804 | 2/12/2018 | | | | | | |