



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 18-040

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated December 2014.]

1. Statutory Authority

As the term is defined in s. 227.26 (4), Stats., the proposed rule does not appear to meet the standard that is required to submit a petition for the expedited repeal of an unauthorized rule. An “unauthorized rule” is a rule for which an agency lacks the authority to promulgate the rule due to the repeal or amendment of the law that previously authorized its promulgation.

In this case, the Department of Health Services (DHS) is proposing to repeal a portion of a rule, s. DHS 107.09 (4) (v) (intro.), which incorporates by reference a former statutory provision. The cross-referenced provision was repealed in 2015 Wisconsin Act 2015. However, because that former provision is not the law that authorized the DHS provision, the statutory repeal does not make the DHS rule “unauthorized”, as that term is defined in s. 227.26 (4), Stats. The department does not reference any changes to its statutory authority to promulgate ch. DHS 107, and it appears that no such changes have been made by the Legislature.

In fact, even though the statutory reference no longer exists, the department proposes to continue to apply restrictions to facilities that agree to receive permanent limitations on payment for each IMD resident received, suggesting that the changes proposed by the department in its petition are not driven by a change in agency authority. The proposed rule appears instead to be a “clean up” of an obsolete cross-reference, approval of which would represent an expansion in the nature of an unauthorized rule petition in comparison to those previously approved by the Joint Committee for Review of Administrative Rules.

2. Form, Style and Placement in Administrative Code

a. An introductory clause should be inserted to specifically enumerate the rule provisions treated and to state the subject matter of the proposed rule. [s. 1.02 (1), Manual.]

b. The rule summary's listing of statutes interpreted should be revised to cite the specific statutory provision that was interpreted for administration and enforcement in the department's original rule: ss. 49.45 and 49.665, Stats. [s. 1.02 (2m) (a) and (b), Manual.]

c. The rule summary's listing of statutory authority should be revised to cite the specific statutory provision that granted rulemaking authority for the original rule: ss. 49.45 (10) and 49.665 (3), Stats. The statutory provision for the expedited rulemaking process, s. 227.26 (4), Stats., should not be cited, as that provision establishes the process and does not remove or confer rulemaking authority for the subject matter addressed in the proposed rule. [s. 1.02 (2m) (a), Manual.]

d. The rule summary's explanation of agency authority should be updated to reflect any revisions made in accordance with the previous comment.

e. The rule summary's listing of related statutes or rules should be revised to identify any statutes or rules that relate to the subject matter addressed in the proposed rule.

f. In the treatment clause for SECTION 1 of the proposed rule, the designation "(intro.)" should be inserted after "(4) (v)". [s. 1.03 (3), Manual.]