STATE OF WISCONSIN
Department of Justice

STATEMENT OF SCOPE OF PROPOSED EMERGENCY RULES

Rule No.: These proposed emergency rules will be placed in a new chapter to be designated Wis. Admin. Code ch. Jus 19. Individual rule numbers have not yet been designated.

Relating to: Standards and procedures for frequent sobriety testing pilot program.

1. Description of the objectives of the rules:

The State of Wisconsin Department of Justice (DOJ) proposes to promulgate emergency administrative rules to implement DOJ's statutory responsibility under Wis. Stat. § 165.957(3) to establish standards and procedures for a frequent sobriety testing pilot program.

Wisconsin Stat. § 165.957 is newly created by 2015 Act 55. It establishes a pilot program for frequent sobriety testing to detect the use of alcohol or controlled substances by certain persons under court or Department of Corrections (DOC) supervision with convictions, suspensions, or revocations arising from intoxicated use of a vehicle. In order to participate, individuals must fall into one of two categories. In the mandatory group are persons ordered by a court or DOC to refrain from using alcohol or controlled substances and to participate in the program as a condition of probation, deferred prosecution, parole, or extended supervision. In the voluntary group are persons who agree to refrain from using alcohol and/or controlled substances while on probation, deferred prosecution, parole, or extended supervision, and volunteer to participate in the program even though not ordered to do so by the court or DOC.

The statute directs DOJ to designate up to five counties to participate in the pilot program.

The proposed emergency rules will cover three subject areas:

First, as a default, the sobriety testing program requires participants to be tested at least twice a day at twelve-hour intervals. *See* Wis. Stat. § 165.957(4)(b)1. DOJ will promulgate rules to establish alternative frequent sobriety testing standards in addition to the default standard. *See* Wis. Stat. § 165.957(3)(a).

Second, the designated counties must collect fees from the individuals participating in the testing program. *See* Wis. Stat. § 165.957(4)(d). DOJ will promulgate rules to establish a standard for setting these fees. *See* Wis. Stat. § 165.957(3)(b). The fee standard established by these rules may include a component allowing DOJ to recoup its costs, through agreement with each county. *See id.*

Third, each designated county must report annually to DOJ the number of program participants; the failure or dropout rate of program participants; the costs associated with the program; and other information DOJ requests. *See* Wis. Stat. § 165.957(6). DOJ will promulgate rules establishing a timeline and procedure for the counties' submission of the required information. *See* Wis. Stat. § 165.957(3)(c).

DOJ's existing administrative rules are located at Wis. Admin. Code chs. Jus 8-12, 14, and 16-18. The emergency rules proposed here will be placed in a new chapter, to be designated Wis. Admin. Code ch. Jus 19. Ch. Jus 19 will be entitled "Frequent Sobriety Testing Pilot Program."

Wisconsin Stat. § 165.957(8) specifically provides that DOJ "may use the emergency rules procedure under s. 227.24 to promulgate [the proposed] rules." Therefore, DOJ is not required to provide evidence that the promulgation of emergency rules is necessary for the preservation of the public, health, safety, or welfare. *See* Exec. Order # 50, ¶ 3.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

The program created by Wis. Stat. § 165.957 is entirely new. Therefore, there are no existing DOJ practices or policies that cover the subject area of the administrative rules here proposed.

South Dakota implemented the first 24/7 sobriety program in 2005. Participants in this program remain in society, enabling them to fulfill their work and family responsibilities as long as they comply with and pass rigorous ongoing sobriety tests. A 2012 study by the RAND Corporation reports a significant decrease in OWI recidivism in South Dakota since the state adopted the 24/7 sobriety program. Since 2005, several other states have adopted similar programs.

3. Statutory authority for the rule (including the statutory citation and language):

A. Wis. Stat. § 165.957.

The proposed rulemaking is authorized by Wis. Stat. § 165.957, which permits the Department of Justice to establish rules as summarized in section 1 of this Scope Statement. Specifically, § 165.957 provides:

> (3) The department of justice may, by rule, establish the following:
>
> (a) A standard for frequent testing for the use of alcohol or a controlled substance that is an alternative to the testing described in sub. (4)(b)1.
>
> (b) A standard for setting fees that counties may collect under sub. (4)(d). The standard may include a component that allows the department of justice to recoup its costs under this section, and as provided in sub. (5)(a).

(c) A timeline and procedure for counties to submit to the department of justice the information required under sub. (6).

. . . .

(8) The department of justice may use the emergency rules procedure under s. 227.24 to promulgate rules specified in sub. (3). Notwithstanding s. 227.24(1)(a) and (3), the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this section.

B. Wis. Stat. § 227.11(2)(a).

The proposed rulemaking is also authorized by Wis. Stat. § 227.11(2)(a), which confers on each administrative agency the power to promulgate administrative rule that the agency determines to be necessary to effectuate the statutory provisions administered by the agency, as long as those rules do not exceed the bounds of correct interpretation of those provisions. Section 227.11(2)(A) provides:

(2) Rule-making authority is expressly conferred as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. 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.

2. 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.

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

4. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:

It is estimated that state employees will spend approximately 200 hours on the rulemaking process for the proposed rules, including research, drafting, and compliance with required rulemaking procedures.

5. Description of all entities that may be impacted by the rule:

The proposed rules governing procedures and standards for a frequent sobriety testing pilot program under Wis. Stat. § 165.957 will affect the interests of Wisconsin residents in the counties designated by DOJ to participate in the program. It will directly affect the interests of individuals who either are required to participate in the program by a sentencing court or DOC, or choose to participate voluntarily. In addition, the proposed rules will indirectly affect the safety interests of the general public in the designated counties and surrounding counties to the extent that the frequent sobriety testing pilot program decreases recidivism by persons convicted of impaired driving offenses.

The proposed rules will affect the interests of the courts in the designated counties and the DOC offices and DOC staff supervising persons who participate in the frequent sobriety testing pilot program as a condition of probation, deferred prosecution, parole, or extended supervision.

6. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:

The only related existing or proposed federal regulation is 23 C.F.R. § 1200.23, "Impaired driving countermeasures grants." That provision establishes criteria for awarding grants to states "that adopt and implement effective programs to reduce traffic safety problems resulting from individuals driving motor vehicles while under the influence of alcohol, drugs, or the combination of alcohol and drugs or that enact alcohol ignition interlock laws." 23 C.F.R. § 1200.23(a).

States may apply for a grant under this section for "[c]osts associated with a 24—7 sobriety program." 23 C.F.R. § 1200.23(c), (*i*) (1)(ix), (2), (3). A 24—7 sobriety program is

> a State law or program that authorizes a State court or a State agency, as a condition of sentence, probation, parole, or work permit, to require an individual who pleads guilty to or was convicted of driving under the influence of alcohol or drugs to—
>
> > (1) Abstain totally from alcohol or drugs for a period of time; and
> >
> > (2) Be subject to testing for alcohol or drugs at least twice per day by continuous transdermal alcohol monitoring via an electronic monitoring device, or by an alternative method approved by NHTSA.

Id. at (b).

7. Anticipated economic impact of proposed rules.

The proposed emergency rules are expected to have minimal or no economic impact locally or statewide.

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