



State of Wisconsin  
2019 - 2020 LEGISLATURE

LRB-1981/P2  
MPG:cjs&cde

DOA:.....Rice, BB0344 - Restore current law with respect to Act 369's provisions related to certain legislative powers and ch. 227.

**FOR 2019-2021 BUDGET -- NOT READY FOR INTRODUCTION**

AN ACT ...; relating to: the budget.

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*Analysis by the Legislative Reference Bureau*

**STATE GOVERNMENT**

**LEGISLATURE**

***1. Retention of legal counsel by the legislature***

Prior to [2017 Wisconsin Act 369](#), representatives to the assembly and senators, as well as legislative employees, could receive legal representation from DOJ in most legal proceedings. Assembly and senate policies and practices also allowed legislators and legislative employees to retain outside legal counsel in some instances.

Act 369 provided all of the following:

1. With respect to the assembly, that the speaker of the assembly may authorize a representative to the assembly or assembly employee who requires legal representation to obtain outside legal counsel if the acts or allegations underlying the action are arguably within the scope of the representative's or employee's duties; and that the speaker may obtain outside legal counsel in any action in which the assembly is a party or in which the interests of the assembly are affected, as determined by the speaker.

2. With respect to the senate, that the senate majority leader may authorize a senator or senate employee who requires legal representation to obtain outside

legal counsel if the acts or allegations underlying the action are arguably within the scope of the senator's or employee's duties; and that the majority leader may obtain outside legal counsel in any action in which the senate is a party or in which the interests of the senate are affected, as determined by the majority leader.

3. That the cochairpersons of the Joint Committee on Legislative Organization may authorize a legislative service agency employee who requires legal representation to obtain outside legal counsel if the acts or allegations underlying the action are arguably within the scope of the employee's duties; and that the cochairpersons may obtain outside legal counsel in any action in which the legislature is a party or in which the interests of the legislature are affected, as determined by the cochairpersons.

This bill eliminates those provisions, restoring previous law with respect to the legislature's retention of legal counsel.

## ***2. Capitol security***

Under Act 369, DOA is required to submit any proposed changes to security at the capitol, including the posting of a firearm restriction, to the JCLO for approval under passive review. This bill eliminates that requirement.

## ***3. Advice and consent of the senate***

Under Act 369, any individual nominated by the governor or another state officer or agency, and with the advice and consent of the senate appointed, to any office or position may not hold the office or position, be nominated again for the office or position, or perform any duties of the office or position during the legislative session biennium if the individual's confirmation for the office or position is rejected by the senate. This bill eliminates that restriction.

# **STATE GOVERNMENT**

## **ADMINISTRATIVE RULES; GUIDANCE DOCUMENTS**

## ***4. Deference to agency interpretations of law***

Prior to [2017 Wisconsin Act 369](#), the statutes did not prohibit courts from according deference to agency interpretations of law in most circumstances. Under Act 369, a court may not accord deference to agency interpretations of law and an agency may not seek such deference from a court.

This bill restores the state of the law prior to Act 369 concerning deference to agency interpretations of law.

## ***5. Suspension of administrative rules***

Prior to [2017 Wisconsin Act 369](#), administrative rules that were in effect could be temporarily suspended by the Joint Committee for Review of Administrative Rules. If JCRAR suspended a rule, JCRAR was required to introduce bills in each house of the legislature to make the suspension permanent. If neither bill to support the suspension was ultimately enacted, the rule would remain in effect and JCRAR could not suspend the rule again. Under current law as established in Act 369, JCRAR may suspend a rule multiple times.

This bill restores the prior law limitations on JCRAR's ability to suspend a rule.

## **6. Agency rule-making authority**

Under [2017 Wisconsin Act 369](#), 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. Additionally, 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.

This bill repeals those limitations on agency rule-making authority.

## **7. Guidance documents**

[2017 Wisconsin Act 369](#) established various requirements with respect to the adoption and use of guidance documents, broadly defined, by state agencies, including requirements that agencies must satisfy in order to adopt guidance documents.

Under Act 369, each agency must submit each proposed guidance document to the Legislative Reference Bureau for publication in the Administrative Register and must 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. Act 369 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.

Also, under Act 369, 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.

This bill eliminates those and related requirements established under Act 369 with respect to agency guidance documents.

## **8. Informational materials**

Under [2017 Wisconsin Act 369](#), a state agency must provide a statutory or administrative rule citation for any statement or interpretation of law that the agency provides in its informational materials. This bill repeals that requirement.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**SECTION 1.** 13.124 of the statutes is repealed.

**SECTION 2.** 13.127 of the statutes is repealed.

**SECTION 3.** 13.91 (1) (c) of the statutes is amended to read:

13.91 (1) (c) Perform the functions prescribed in ~~ch. 227 s. 227.15~~ for the review and resolution of problems relating to administrative rules ~~and guidance documents~~.

**SECTION 4.** 16.84 (2m) of the statutes is repealed.

**SECTION 5.** 35.93 (2) (b) 3. im. of the statutes is repealed.

**SECTION 6.** 227.01 (3m) of the statutes is repealed.

\*\*\*NOTE: I have omitted any treatment reversing changes to the definition of rule under s. 227.01 (13). The changes in Act 369 were purely technical. MPG

**SECTION 7.** 227.05 of the statutes, as created by [2017 Wisconsin Act 369](#), is repealed.

**SECTION 8.** Subchapter II (title) of chapter 227 [precedes 227.10] of the statutes is amended to read:

## **CHAPTER 227**

### **SUBCHAPTER II**

#### **ADMINISTRATIVE RULES AND GUIDANCE DOCUMENTS**

**SECTION 9.** 227.10 (2g) of the statutes is repealed.

**SECTION 10.** 227.11 (title) of the statutes is amended to read:

**227.11** (title) **Agency Extent to which chapter confers rule-making authority.**

**SECTION 11.** 227.11 (3) of the statutes is repealed.

**SECTION 12.** 227.112 of the statutes is repealed.

**SECTION 13.** 227.13 of the statutes is amended to read:

**227.13 Advisory committees and informal consultations.** An agency may use informal conferences and consultations to obtain the viewpoint and advice of interested persons with respect to contemplated rule making. An agency may also appoint a committee of experts, interested persons or representatives of the public to advise it with respect to any contemplated rule making. ~~Such a~~ The committee shall have advisory powers only. ~~Whenever an agency appoints a committee under this section, the agency shall submit a list of the members of the committee to the joint committee for review of administrative rules.~~

**SECTION 14.** 227.26 (2) (im) of the statutes is repealed.

**SECTION 15.** 227.40 (1) of the statutes is amended to read:

227.40 (1) Except as provided in sub. (2), the exclusive means of judicial review of the validity of a rule ~~or guidance document~~ shall be an action for declaratory judgment as to the validity of the rule ~~or guidance document~~ brought in the circuit court for the county where the party asserting the invalidity of the rule ~~or guidance document~~ 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. The officer or other agency whose rule ~~or guidance document~~ is involved shall be the party defendant. The summons in the action shall be served as provided in s. 801.11 (3) and by delivering a copy to that officer or, if the agency is composed of more than one person, to the secretary or clerk of the agency or to any member of the agency. The court shall render a declaratory judgment in the action only when it appears from the complaint and the supporting evidence that the rule ~~or guidance document~~ or its threatened application interferes

with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff. A declaratory judgment may be rendered whether or not the plaintiff has first requested the agency to pass upon the validity of the rule ~~or guidance document~~ in question.

**SECTION 16.** 227.40 (2) (intro.) of the statutes is amended to read:

227.40 (2) (intro.) The validity of a rule ~~or guidance document~~ may be determined in any of the following judicial proceedings when material therein:

**SECTION 17.** 227.40 (2) (e) of the statutes is amended to read:

227.40 (2) (e) Proceedings under s. 66.191, 1981 stats., or s. 40.65 (2), 106.50, 106.52, 303.07 (7) or 303.21 or ss. 227.52 to 227.58 or under ch. 102, 108 or 949 for review of decisions and orders of administrative agencies if the validity of the rule ~~or guidance document~~ involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered.

**SECTION 18.** 227.40 (3) (ag) of the statutes is amended to read:

227.40 (3) (ag) In any judicial proceeding other than one under sub. (1) or (2), in which the invalidity of a rule ~~or guidance document~~ is material to the cause of action or any defense thereto, the assertion of that invalidity shall be set forth in the pleading of the party maintaining the invalidity of the rule ~~or guidance document~~ in that proceeding. The party asserting the invalidity of the rule ~~or guidance document~~ shall, within 30 days after the service of the pleading in which the party sets forth the invalidity, apply to the court in which the proceedings are had for an order suspending the trial of the proceeding until after a determination of the validity of the rule ~~or guidance document~~ in an action for declaratory judgment under sub. (1).

\*\*\*NOTE: Above and in the treatment of other provisions referencing guidance documents, I have omitted treatment of changes in Act 369 that were purely technical.  
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**SECTION 19.** 227.40 (3) (ar) of the statutes is amended to read:

227.40 (3) (ar) Upon the hearing of the application, if the court is satisfied that the validity of the rule ~~or guidance document~~ is material to the issues of the case, an order shall be entered staying the trial of said proceeding until the rendition of a final declaratory judgment in proceedings to be instituted forthwith by the party asserting the invalidity of the rule ~~or guidance document~~. If the court finds that the asserted invalidity of the rule ~~or guidance document~~ is not material to the case, an order shall be entered denying the application for stay.

**SECTION 20.** 227.40 (3) (b) of the statutes is amended to read:

227.40 (3) (b) Upon the entry of a final order in the declaratory judgment action, it shall be the duty of the party who asserts the invalidity of the rule ~~or guidance document~~ to formally advise the court of the outcome of the declaratory judgment action so brought as ordered by the court. After the final disposition of the declaratory judgment action the court shall be bound by and apply the judgment so entered in the trial of the proceeding in which the invalidity of the rule ~~or guidance document~~ is asserted.

**SECTION 21.** 227.40 (3) (c) of the statutes is amended to read:

227.40 (3) (c) Failure to set forth the invalidity of a rule ~~or guidance document~~ in a pleading or to commence a declaratory judgment proceeding within a reasonable time pursuant to the order of the court or to prosecute the declaratory judgment action without undue delay shall preclude the party from asserting or maintaining that the rule ~~or guidance document~~ is invalid.

**SECTION 22.** 227.40 (4) (a) of the statutes is amended to read:

227.40 (4) (a) In any proceeding pursuant to this section for judicial review of a rule ~~or guidance document~~, the court shall declare the rule ~~or guidance document~~

invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated ~~or adopted~~ without compliance with statutory rule-making ~~or adoption~~ procedures.

**SECTION 23.** 227.40 (6) of the statutes is amended to read:

227.40 (6) Upon entry of a final order in a declaratory judgment action under sub. (1) ~~with respect to a rule~~, the court shall send an electronic notice to the legislative reference bureau of the court's determination as to the validity or invalidity of the rule, in a format approved by the legislative reference bureau, and the legislative reference bureau shall publish a notice of that determination in the Wisconsin administrative register under s. 35.93 (2) and insert an annotation of that determination in the Wisconsin administrative code under s. 13.92 (4) (a).

**SECTION 24.** 227.57 (11) of the statutes is amended to read:

227.57 (11) Upon review of an agency action or decision affecting a property owner's use of the property owner's property, the court shall accord no deference to the agency's interpretation of law if the agency action or decision restricts the property owner's free use of the property owner's property.

**SECTION 25.** 801.50 (3) (b) of the statutes is amended to read:

801.50 (3) (b) All actions relating to the validity or invalidity of a rule ~~or guidance document~~ shall be venued as provided in s. 227.40 (1).

(END)