

DATE: October 28, 2015
FROM: State Representative Adam Neylon
TO: Assembly Committee on State Affairs and Government Operations
RE: Supporting AB 251

First, I want to thank the Chairman and the Committee for holding this hearing today.

The goals of AB 251 are: 1) return some legislative oversight to the rule-making process, 2) provide more accountability in the economic impact analysis being done, and 3) give the public a better opportunity to give feedback on proposed rules.

This bill accomplishes those goals by making the following changes:

- 1) OBD & SBRRB – This bill requires agencies to submit scope statements for proposed rules to the Office of Business Development. The Office of Business Development will review the rule and report to the Governor whether they believe the agency also has the authority to promulgate such a rule. Additionally, the Office of Business Development, instead of the agency itself, will determine whether or not the rule has an impact on small businesses. If it does, the rule will be submitted to the Small Business Regulatory Review Board for a determination as to the extent of that impact.

Under this bill the OBD, in addition to the JCRAR, may make a determination that an agency's statement of policy or an interpretation of a statute meets the definition of a rule.

- 2) Public Hearings – This bill requires agencies to hold a public hearing on the scope statement after the Governor approves the scope statement. This change gives the public a chance to give feedback on a proposed rule's scope statement before an agency promulgates that actual language.
- 3) Economic Impact Analyses – This bill will hold agencies accountable by adding some oversight to their economic impact analyses for new rules. Agencies will be required to submit all economic impact analyses to the Secretary of Revenue for review and approval. Additionally, the co-chairs of JCRAR or the Sec. of Revenue may request an independent economic impact analysis to be prepared for a proposed rule.
- 4) Changes for new rules above \$10 mil. – This bill provides that any proposed rule that has an estimated economic impact of over \$10 mil. in implementation or compliance costs must be submitted to the JCRAR. The JCRAR must introduce a bill to be enacted that authorizes the promulgation of said rule, before an agency can resume the rule making process.
- 5) Emergency rules – This bill reduces the number of extensions an agency may acquire for the effective period of an emergency rule. The current emergency rule making process allows agencies to circumnavigate the public notice and hearing requirements. This bill forces agencies to begin the formal rule-making process sooner, thereby limiting the time a rule may be enforced without giving the public formal notice or a chance to comment at a hearing

Thank you for your time and I'm happy to take any questions.



DEVIN LEMAHIEU

STATE SENATOR

October 28, 2015

Assembly Committee on State Affairs and Government Operations Testimony on Assembly Bill 251

Chairman Swearingen and Members,

Thank you for reviewing my testimony on Assembly Bill 251, which brings new reforms to Wisconsin's administrative rules process. I apologize that I am unable to appear in person today, but I hope that you will consider my written comments.

I operate a small newspaper that serves several communities in Sheboygan County. As a small business owner, I am often frustrated by the excessive paperwork and unnecessary bureaucratic regulations that burdens my business. My profit margin is narrow, so higher administrative costs mean higher prices for my customers. I ran on a promise of reducing government red-tape for my constituents, and AB 251 is another way I am meeting that pledge.

The Legislature made historic reforms to the rule-making process with 2011 Act 21. This Act gave new authority to the Legislature over administrative rule-making. It also required additional review by the Executive Branch prior to submitting a rule.

Assembly Bill 251 takes the next steps to ensure that bureaucratic rules do not harm Wisconsin's job creators. It requires an *independent* economic impact analysis of proposed rules that are estimated to cost Wisconsin businesses, local governments, and citizens in excess of \$10 million in compliance costs over two years. Under the proposal, both the Department of Administration and the Joint Committee for the Review of Administrative Rules have the authority to request such an analysis.

AB 251 also requires additional oversight to help ensure agencies cannot sidestep a robust review process. This includes requiring a public hearing and comment period to review scope statements. This hearing is *in addition to*, not *in place of*, the existing hearing process.

AB 251 will help us continue to strive for a government that is accountable to the people, not unelected bureaucrats. Thank you for your consideration.



**WISCONSIN DEPARTMENT OF
ADMINISTRATION**

SCOTT WALKER
GOVERNOR

SCOTT A. NEITZEL
SECRETARY

Office of the Secretary
Post Office Box 7864
Madison, WI 53707-7864
Voice (608) 266-1741
Fax (608) 267-3842

**Assembly Committee on State Affairs and Government Operations
Wednesday, October 28, 2015
Testimony of Deputy Secretary Cate Zeuske, Department of Administration
Assembly Bill 251**

Good morning, Chairman Swearingen and members of the committee on State Affairs and Government Operations. My name is Cate Zeuske and I am the Deputy Secretary at the Department of Administration. Today I am before you to provide information regarding Assembly Bill 251, which makes changes to the rule-making process. I am here today because the bill involves the Office of Business Development, which is attached to the Department of Administration, in the rule-making process. As the Office of Business Development's supervisor, I am happy to share their role in rule-making in Assembly Bill 251. Involving the Office of Business Development in the process will ensure that the rules promulgated by agencies have increased public input, especially on the economic impact to Wisconsin businesses.

Because Assembly Bill 251 involves the Office of Business Development in the rule-making process, I would like to first outline the history of the office for you. The Office of Business Development was established by Governor Walker in the 2011-13 biennial budget to help Wisconsin businesses navigate the regulatory environment in Wisconsin and to provide support to the long-standing Small Business Regulatory Review Board. Through these responsibilities, the Office has developed a process to work with agencies and businesses to ensure expedient and fair results for all parties involved when there are questions regarding regulations and their implementation. Nancy Mistele and Joe Knilans are currently the Governor's appointees as director and deputy director of this office. They both have vast knowledge and experience in assisting businesses and understanding the laws and rules governing businesses in Wisconsin. This experience will help them to identify a negative impact a proposed rule would have on small businesses, as Assembly Bill 251 directs their office to do.

I would like to outline the five areas where Office of Business Development will be involved in rule-making under Assembly Bill 251.

1. Scope statements would be submitted to the Office of Business Development, prior to being submitted to the Governor. The Office would determine if the agency has the authority to promulgate the proposed rule and make a recommendation to the Governor regarding approval of the scope statement.
2. The Office would review proposed permanent and emergency rules in final draft form under the same process outlined for the review of scope statements.
3. The Office of Business Development, rather than agency regulators, will determine if a proposed rule would have an economic impact on small businesses. A rule that is determined to have an impact on small businesses would then be reviewed by the Small Business Regulatory Review Board, chaired by Representative Neylon.

4. The Office of Business Development is directed to provide consultation and assistance to the agencies and the Small Business Regulatory Review Board regarding the promulgation of rules.
5. The Office may also review a statement of policy or interpretations of statute. If the Office determines that the statement or interpretation meets the definition of a rule, the office may direct the agency to instead promulgate a rule.

Assembly Bill 251 also makes changes to when the public is able to provide input in the rule-making process. The bill requires an agency to hold a preliminary public hearing and comment period on the scope statement – before an agency can even begin drafting the proposed rule. I truly believe that this additional public hearing on scope statements will increase transparency in the rule-making process. The scope statement hearing will allow stakeholders, businesses, professional organizations, and your constituents to have their input heard in rulemaking from the beginning of the process, which will ensure that rules are not overly burdensome and do not cause a drain on Wisconsin's economy.

Finally, I would like to take this opportunity to address some of the concerns that have been raised regarding this legislation – that the additional steps in the rulemaking process involving the Office of Business Development and additional economic impact analyses will create a burden in the rulemaking process and will slow down promulgation of necessary rules. After carefully reviewing this legislation with the Office of Business Development and stakeholders, I am confident that the rule-making process will only be slowed down if, and only if, the proposed rule has the potential to negatively impact businesses or the regulated community. Furthermore, the emergency rulemaking process will remain in place for rules that require a certain level of expediency on a temporary basis, when it is appropriate for agencies to use.

The Office of Business Development and the small business community are excited about the proposed changes to the rule making process in Assembly Bill 251. These changes will ensure that the business community, who is most often adversely affected by rules, is involved in the rule making process from the beginning through the Office of Business Development. By implementing the economic safeguards in this bill, including the economic impact analyses and JCRAR review of rules that have extreme negative economic impacts on businesses, businesses will continue to be able to grow and develop in this great state, instead of being hindered by burdensome regulation and rules.



Wisconsin Independent Businesses Inc.

The voice of independent business in state government

October 28, 2015

TO: Members
Assembly Committee on State Affairs and Government Operations

FR: Brian Dake
Legislative Director
Wisconsin Independent Businesses

RE: 2015 Assembly Bill (AB) 251 relating to various changes regarding administrative rules and rule-making procedures; time limits for emergency rules; and making an appropriation

Chairman Swearingen and committee members, thank you for the opportunity to testify in support of 2015 Assembly Bill (AB) 251. My name is Brian Dake and I am the Legislative Director for Wisconsin Independent Businesses.

By way of background, Wisconsin Independent Businesses (WIB) was formed in 1977 to provide small, independent businesses with a voice in the legislative and regulatory activities of state government. Today, we have more than 4,000 members – the vast majority of whom own and operate businesses with fewer than 25 employees.

Small, independent business owners do not know all the details of the state's administrative rule-making process, but they are quite familiar with the regulations produced by this process. They know regulations carry the force of law and compliance is not optional. They know the regulations can be costly and time-consuming.

On behalf of our members, we have sought reforms to the administrative rule-making process. We believe a process which is fair to all, open to everyone and responsive to the marketplace will result in reasonable regulations that do not come with a heavy burden and a high price tag for small businesses.

In 2011, state lawmakers enacted several substantial reforms to the administrative rule-making process – reforms that we believe have made the process more transparent and accountable.

2011 Wisconsin Act 21 requires gubernatorial approval and economic impact analyses of proposed state agency regulations. It prohibits state agencies from creating and enforcing regulations more restrictive than the standards, requirements and thresholds set forth in law.

2011 Wisconsin Act 46 creates a forum for small businesses to influence the rule-making process. The newly recreated Small Business Regulatory Review Board has the authority to review and recommend changes to proposed state agency rules that have a significant economic impact on a substantial number of small businesses.

2015 Assembly Bill (AB) 251 builds upon the reforms enacted four years ago and makes our state's administrative rule-making process even better. For WIB, the key elements of AB 251 include:

- a) Independent Economic Analysis – state agencies often lack the technical expertise and private sector experience to discern the true compliance costs of a proposed regulation. AB 251 addresses this shortcoming by granting the Secretary of the Department of Revenue and the Legislature with the authority to request an independent economic impact analysis;
- b) “Capping” Costly Regulations – the compliance costs of a particular regulation often become known only after the rule-making process has begun. If those compliance costs rise dramatically, it is appropriate for lawmakers to take a second look at the proposed regulation. Under AB 251, if an Economic Impact Analysis determines that a proposed regulation would result in compliance costs to businesses of more than \$10 million over a two-year period, the state agency would have to either withdraw the regulation, make changes to the proposed regulation that reduce the compliance costs or get authorization from state lawmakers to proceed ahead;
- c) Outreach to Small Business – the Office of Business Development (OBD) and the Small Business Regulatory Review Board are directed to work with state agencies to ensure small businesses are aware of proposed regulations which may impact them and recommend changes to those regulations which place an undue compliance burden on small businesses;

- d) Preliminary Public Hearings – the administrative rule-making process is a lengthy process and there are steps along the way for public input, but the value of that input is enhanced when it is provided at the beginning of the rule-making process. AB 251 creates a new opportunity for small businesses to help inform state agencies of their concerns with a proposed regulation;
- e) Agency Promulgation of a Statement of Policy or Interpretation of Statute – the importance of this provision was made clear to us at a recent public hearing on 2015 Senate Bill (SB) 239 relating to the regulation of high capacity wells.

Larry Lynch from the DNR Bureau of Drinking and Groundwater testified for information only on the bill. During questioning from Committee members, he was asked by Senator Taylor to describe the process by which the Department reviews High Capacity Well applications. After describing the review process, he said: “if you are going to ask me where that process is written down in code or in statute it is not. We are working off the Lake Beulah decision... we are working off an Administrative Law Judge decision in the Richfield Dairy case.”

There is very little certainty to an ad hoc process. The administrative rule-making process is designed to provide certainty of process.

Again, thank you for the opportunity to testify in favor of AB 251. We respectfully ask for your support of this legislation.



WISCONSIN

**Statement Before the
Assembly Committee on State Affairs and Government Operations
By**

**Bill G. Smith
State Director
National Federation of Independent Business
Wisconsin Chapter**

**Wednesday, October 28, 2015
Assembly Bill 251**

Mr. Chairman, members of the Committee, my name is Bill G. Smith, and I am State Director of the Wisconsin Chapter of the National Federation of Independent Business, an organization of nearly 11,000 member firms, and for over 70 years, our nation's leading advocate on behalf of small and independent business.

The regulation of small business is an on-going serious public policy problem, and a daunting private sector challenge for business owners large and small.

NFIB members have consistently ranked the cost of regulations a significant barrier to their ability to grow, to hire, and to succeed.

While regulations impact all businesses, small businesses spend 80% more per worker than large employers to comply with government regulations, and according to NFIB survey studies, 91% reported it is impossible to know what to comply with, and understand all regulations that impact their business.

The disproportionate burden of regulation on small firms stems from economies of scale inherent in the regulatory process and impacts small business in three ways:

- Discovering regulation
- Understanding regulation
- Paying for regulation

Beginning in 1980, when President Jimmy Carter signed into law the then historic Federal Regulatory Flexibility Act, NFIB has been at the forefront of small business regulatory reform that achieves each of these goals.

In 1983, Governor Tony Earl signed into law a state version of the Federal Regulatory Flexibility Act as part of the 1983 Special Session on Economic Development.

Under the 1983 Regulatory Flexibility Act, agencies must consider whether an existing or proposed regulation will have an impact on small business. If the answer is yes, it will impact small business, then the agency must consider several additional steps in the promulgation process, including reaching out to those small businesses impacted by the rule for their input.

Statement Before Assembly Committee on State Affairs and Government Operations – continued

Wednesday, October 28, 2015

Page Two

In short, agencies must provide small businesses the opportunities to participate in the rule-making process by providing special notice of rules that affect them, and conduct public hearings on that impact. Agencies are also required to prepare an analysis describing the types of small businesses affected, compliance procedures, and the skills necessary for compliance.

In short, Regulatory Flexibility, enacted 30 years ago, called on state and federal government agencies to be more sensitive to how regulations impact small business. The goal of small business regulatory flexibility is to help government understand and address the inequity and basic unfairness of regulating Al's Garage in Rhinelander the same as Briggs and Stratton in Milwaukee. The Regulatory Flexibility Act, from the beginning, was designed to reduce the regressive impact of a one-size-fits-all regulatory scheme by forcing regulators to consider the differences between big business and small business.

In March of 2002, Governor Scott McCallum created the Small Business Task Force on Regulatory Reform to examine Wisconsin's regulatory environment, and the effectiveness of the 1983 Regulatory Flexibility Act. The recommendations of the Task Force, which included small business owners and organizations that represented 40,000 firms, resulted in the passage of Senate Bill 100, and enactment of 2003 Act 145.

This new law made several significant changes to the 1983 Regulatory Flexibility Act, including the creation of a Small Business Regulatory Review Board to assist agencies with compliance issues, eliminating or reducing the amount of cross references, allowing agencies to waive or reduce penalties for non-compliance, a requirement to provide small business with additional time to comply with new rules, and many other significant changes in the regulatory process.

In 2011, Senate Bill 47 became law (2011 Act 46) which included provisions that changed the composition of the Small Business Regulatory Review Board, and it mandated that agencies establish mechanisms/procedures for reduced fines and enforcement alternatives for minor violations, and a requirement that if a proposed rule has any economic impact on small business, the agency must submit the rule to the Small Business Regulatory Review Board. The Board may use cost benefit analysis to determine the impact of the rule on small business, and also must determine whether the rule has a significant economic impact on a substantial number of small businesses.

Act 46 strengthened the Small Business Regulatory Review Board empowering small business owners by giving them a process to judge the impact of regulations on small business.

Finally, in 2013, the Legislature enacted Act 296, which requires agencies to promulgate a rule that discloses in advance the discretion that the state agency will follow in the enforcement of rules against a small business when it commits a minor violation of a rule. The Act specifically lists several criteria for allowing discretion in the enforcement of a rule or assessment of a penalty for a minor violation.

Governor Walker sent a message to state agencies when he signed Executive Order 61. The order:

- 1) Requires all state agencies to review 2011 Wisconsin Act 46 to ensure they are in compliance, ready to assist small business owners, and properly submitting any proposed rules with an economic impact to the Board;
- 2) Requires all state agencies to cooperate with the Small Business Regulatory Review Board to identify existing rules hindering job creation and small business growth;
- 3) Require all state agencies to work with the Board to recommend changes to these rules that will both reduce their burden on job creators while continuing to comply with the intent of the statutes that created them;

-- continued

Statement Before Assembly Committee on State Affairs and Government Operations – continued

Wednesday, October 28, 2015

Page Three

- 4) Require agencies to work with the Board to identify strategies that will increase compliance with existing rules;
- 5) Request that the Board engage small business owners and their representative organizations to gather input on any rules hindering job growth;

Mr. Chairman, I thought it would be appropriate to review the history of regulatory reform in Wisconsin as it relates to small business, but of course, we have some unfinished business.

While each of the four acts and the Executive Order that I have summarized made significant improvements in our state's regulatory environment for small business, the problem remains one of compliance – not one of process.

It is basic to the small business regulation process that small business owners themselves – that is the regulated – be actively involved in the process of promulgating regulations that impact them. Assembly Bill 251 would displace the authority of the Small Business Regulatory Review Board with key decision-making by government officials about whether regulations may or may not impact small business.

Assembly Bill 251 fails on both of the following key principles of regulatory reform as it relates to small business:

- 1) It includes provisions that allow government officials to determine whether a proposed rule may have an economic impact on small business, and furthermore allows government officials to decide whether the rule will even be reviewed by the broader small business community as represented by the small business owner members who serve on the Small Business Regulatory Review Board.
- 2) While AB 251 includes some of the provisions of the current small business regulatory reform Acts, it throws our small business community into a big business process that touches the Department of Revenue, Department of Administration, Joint Committee for Review of Administrative Rules, Standing Committees of the Legislature, the Governor's Office, and the Office of Business Development.

In conclusion, Mr. Chairman, our small business community does not need 35 pages of regulatory process reform. We have worked hard since the 1980's on regulatory reform initiatives, and we are grateful for the bipartisan support these initiatives have had in the legislature.

While we commend the authors for taking on reforms that may be beneficial to some segments of the business community, we cannot support legislation that would add complexity and uncertainty to the regulatory environment of small business. The legislation would reform the rule-making process, but our small and independent business community doesn't have a process problem, we have a compliance problem.

Government agencies are either unaware, unwilling, or insensitive to the requirements of current law as it relates to how regulations impact small business, and that culture in state government needs to be addressed.

Therefore, we suggest any small business provisions and references be removed from Assembly Bill 251, and allow those working on behalf of small business to focus on reforms that address the real needs of our Main Street businesses.

Thank you.



WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

2011 Wisconsin Act 46
[2011 Senate Bill 47]

**Administrative Rules:
Considerations for Small Business**

2011 Wisconsin Act 46 makes several changes to the administrative rule making process as that process relates to small business and requires the involvement of the Small Business Regulatory Review Board (SBRRB).

Composition of the Small Business Regulatory Review Board

Act 46 modifies the composition of the SBRRB by deleting state agency representation on the board and increasing the number of representatives of small businesses from six to seven. Following Act 46, the SBRRB is composed of seven representatives of small businesses, one Senate member, and one Assembly member.

Considerations for Small Business

Under Act 46, and agency must, consistent with the requirements of s. 895.59, Stats., and to the extent possible, do all of the following:

- Provide assistance to small businesses to help small businesses comply with rules promulgated by the agency.
- Establish, by rule, reduced fines and alternative enforcement mechanisms for minor violations of administrative rules made by small businesses. These rules must include a definition of “minor violation.”
- In deciding whether to impose a fine against a small business for a violation of a rule, consider the appropriateness of a written warning, reduced fine, or alternative penalty if all of the following apply:
 - The small business has made a good faith effort to comply with the rule.

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature’s Web site at: <http://www.legis.state.wi.us/>.

- The rule violation does not pose a threat to public health, safety, or welfare.
- Establish methods to encourage the participation of small businesses in rule making.

Small Business Regulatory Coordinator

2011 Wisconsin Act 46 modifies current law regarding an agency's designation of a small business regulatory coordinator. Under the Act, each agency must designate at least one employee to serve as the small business regulatory coordinator, and the agency shall publicize that employee's e-mail address and telephone number. The small business regulatory coordinator shall act as a contact person for small business regulatory issues for the agency.

Role of SBRRB in Agency Rule Making

Under Act 46, if an agency determines that a proposed rule has *any* economic impact on small businesses, the agency must submit the rule to the SBRRB on the same day it submits the rule to the Legislative Council staff for review. Previously, submission to the SBRRB was required only if the agency determined that the rule had a *significant* economic impact on small businesses.

Under the Act, following submission to the SBRRB, the SBRRB may use cost-benefit analysis to determine the fiscal effect of the rule on small businesses and must determine whether the rule has a significant economic impact on a substantial number of small businesses. If the board determines that the proposed rule will not have a significant economic impact on a substantial number of small businesses, the board shall submit a statement to that effect to the agency that sets forth the reason for the board's decision.

Alternatively, if the board determines that the proposed rule will have a significant economic impact on a substantial number of small businesses, the board may submit to the agency suggested changes in the proposed rule to minimize the economic impact of the proposed rule, or may recommend the withdrawal of the proposed rule. Additionally, the board must submit a report of any suggested changes to the Legislative Council staff.

Under Act 46, when an agency submits a rule to the Legislature, the report that accompanies the rule must include any statement, suggested changes, or other material submitted to the agency by the SBRRB. When the SBRRB determines that a proposed rule will have a significant economic impact on a substantial number of small businesses, the agency must also prepare a final regulatory flexibility analysis.

At the end of the rule-making process, when the agency files a rule for publication with the Legislative Reference Bureau (LRB), the agency must include with the rule a summary of the final regulatory flexibility analysis and a summary of the comments of the legislative standing committees, if any. If the rule does not require the analysis, the agency shall include with the rule a statement of the reason for the SBRRB's determination that the rule will not have a significant economic impact on a substantial number of small businesses.

Emergency Rules

Under 2011 Wisconsin Act 46, emergency rules that have *any* economic impact on small businesses must be referred to the SBRRB. The board may use cost-benefit analysis to determine the fiscal effect of the emergency rule on small businesses and shall determine whether the emergency rule

will have a significant economic impact on a substantial number of small businesses. If the board determines that the emergency rule will not have a significant economic impact on a substantial number of small businesses, the board shall submit a statement to that effect to the agency that sets forth the reason for the board's decision. If the board determines that the emergency rule will have a significant economic impact on a substantial number of small businesses, the board may submit to the agency and to the Legislative Council staff suggested changes in the emergency rule to minimize the economic impact of the emergency rule.

Effective Date and Initial Applicability

2011 Wisconsin Act 46 takes effect on November 15, 2011. Generally, the provisions of the Act that require referral of rules to the SBRRB first apply to proposed administrative rules submitted by an agency to the Legislative Council staff, or, for emergency rules, to the LRB, on November 15, 2011.

Effective date: November 15, 2011.

Prepared by: Scott Grosz, Senior Staff Attorney

November 16, 2011

SG:ksm

Regulatory Flexibility Act 1983 Wisconsin Act 90

A Summary of Current Law

Wisconsin currently has a law on the books requiring state agencies to consider the impact of a new regulation on small businesses. The RFA was passed in 1983 and went into effect on January 1, 1984. Unfortunately, the Act is not being used to its full potential when state agencies create a new administrative rule.

Administrative Rule Process

Under the Regulatory Flexibility Act, state agencies must determine if a particular rule or proposal being considered by their agency will or will not have an impact on small business. (Initial Regulatory Flexibility Analysis) If it is determined that it will impact small business the agency must consider several actions in order to reduce the impact on the small business.

- Can they establish less stringent schedule or deadlines with compliance or reporting requirements?
- Can they consider consolidating or simplifying compliance or reporting requirements?
- Can they consider the establishment of performance standards for design or operational standards?
- Can they consider the possible exemption of small businesses for the requirements of a rule?

Notice of Rule Proposal

The second part of the rule requires an opportunity for small businesses to provide input on rules, which affect the small businesses. The rules are then sent out to those businesses affected. The agency must prepare an initial analysis which describes the type of small business affected, the procedures required for compliance, and the professional skills necessary to comply with the rule.

Final Regulatory Flexibility Analysis

The agency will provide the legislature a final Regulatory Flexibility Analysis, which contains as much information as they can gather with the existing staff and resources. The final Regulatory Flexibility Analysis includes the following:

1. The agency's reason for including or excluding methods to reduce the rules impact on small business.

2. A summary by the agency of the issues that were raised by the small businesses during hearing of the rule proposal. Including any recommended changes in the propose rule as a result of those hearings and the continents that they received from small business. The reasons the agency has for rejecting any changes that were suggested by the small business owners who participated in the hearings.
3. The nature and estimated cost of the preparing of reports or any other measured or investment required for small business comply with the rule
4. Any additional cost to the agency to administer or enforce a rule that includes any kind of "tiering" for small businesses.

The law also required that all existing rules be reviewed within five years of the effective date of the law. Agencies should be considering methods for reducing impact on small business when making rules and were supposed to bring all existing rule in compliance with the regulatory flexibility requirements.

Q. What is considered a small business in Wisconsin?

A. Independently owned and operated business entity including affiliates, which is not dominant in the field which has fewer then 25 fulltime employees or 2-1/2 million in gross sales.

However, the law also allows the agency to change that definition when necessary, allowing flexibility with the rule.

Regulatory Flexibility and the Small Business

Agencies shall provide small businesses the opportunities to participate in the rulemaking process by providing special notice of rules that affect them and conduct public hearings on their impact. When giving notice, agencies must prepare an initial regulatory flexibility analysis describing types of small businesses affected, compliance procedures, and the skills necessary for compliance.

In their report to the legislature, agencies must include the following in their analysis:

1. The reason for including or excluding methods to reduce the rules impact the rule on small business, including negative affects on public health, safety and welfare.
2. A summary by the agency of the issues raised by the small businesses and any changes made as a result of that contact.

3. An estimate cost of the preparing of reports in complying with the proposed rule.
4. Will this Legislation adversely effect the environment, public health, workers safety, and public welfare?
5. The analysis also must address questions of public health, safety and welfare.

*If the tiering of the rule would have a significant negative impact on the environment, public health, workers safety, and welfare, then the legislative review process would not allow the adoption of the rule. Furthermore, if the tiering would be contrary to the statutory objectives then the rule could not be tiered.

6. Emergency rules are exempt.
7. The law does not apply to the rules relating to the county or municipality administration of state and federal programs.



WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

2013 Wisconsin Act 296
[2013 Senate Bill 497]

**Agency Discretion in Imposing
Penalties for Minor Rule Violations**

2013 Wisconsin Act 296 requires state agencies to promulgate a rule that discloses in advance the discretion that the state agency will follow in the enforcement of rules against a small business that commits a minor violation of a rule. Under the Act, “small business” means a business entity, including its affiliates, which is independently owned and operated and not dominant in its field, and which employs 25 or fewer full-time employees or which has gross annual sales of less than \$5,000,000. “Minor violation” means a rule violation that does not cause serious harm to the public, is committed by a small business, and the violation is not willful, the violation is not likely to be repeated, there is a history of compliance by the violator, or the small business has voluntarily disclosed the violation.

A rule promulgated under the Act must specify the situations in which discretion in enforcement will be allowed. In promulgating the rule, the state agency must consider a number of criteria for allowing discretion in the enforcement of a rule or assessment of a penalty for a minor violation, including the following:

- The difficulty and cost to a small business of complying with a rule.
- The financial capacity of the small business, including the ability of the small business to pay the amount of the possible penalty.
- The compliance options available.
- The level of public interest and concern.
- The opportunities available to the small business to understand and comply with a rule.
- Fairness to the small business and to others, including competitors and the public.

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature’s Web site at: <http://www.legis.wisconsin.gov>.

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.wisconsin.gov
<http://www.legis.wisconsin.gov/lc>

(OVER)

Under the Act, each state agency must document every instance that it utilizes discretion in penalizing a business for a minor rule violation. Furthermore, each state agency must maintain records of those instances for at least five years.

The Act also specifies that a state agency may not exercise discretion in enforcing the following types of rule violations:

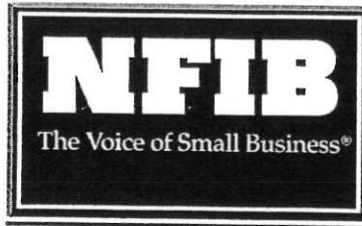
- Minor violations involving a small business that has violated the same rule more than three times in the past five years.
- Minor violations that result in a substantial economic advantage for the small business.
- Minor violations that may result in an imminent endangerment to public health or safety.

Effective date: The Act took effect on April 18, 2014.

Prepared by: Michael Queensland, Staff Attorney

May 2, 2014

MQ:jb;jal



WISCONSIN

Small Business Regulatory Fairness Act

- Creation of an electronic clearinghouse for rule proposals which will include a section devoted to proposed rules affecting small business.
- Rules must be written in easy to understand language eliminating or reducing the amount of cross-references.
- Each agency shall establish a small business regulatory coordinator and list the coordinator's electronic mail address and telephone number and a link to an Internet site that allows a small business owner to review rule proposals and make comments.
- Creation of a Regulatory Review Board to assist agencies with compliance issues relating to the 1983 Small Business Regulatory Flexibility Act.
- Provide small business with additional time to comply with new rules.
- Under certain circumstances, agencies may waive or reduce penalties for violation of rules when voluntarily disclosed by a small business.
- Agencies are required to ensure the accuracy, integrity and consistency of data used in preparing a rule.
- Under certain circumstances, allow for judicial review of penalties imposed on small business for noncompliance with rules.
- Agencies are required to describe enforcement provisions of rule proposals that impact small business.