



WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

Changes in Laws Relating to Administrative Rule-Making

2011 Wisconsin Act 21, which took effect on June 8, 2011, places new limits on state agency rule-making authority and grants new powers to the Governor to approve or reject proposed rules. This Information Memorandum describes the provisions of Act 21 relating to agency authority to promulgate rules; gubernatorial approval of scope statements and final draft rules; economic impact analyses; legislative review of proposed rules; and venue in judicial review actions. The Information Memorandum discusses when various provisions of the law first apply and how the new law is being implemented. In addition, the Information Memorandum briefly describes additional changes in laws relating to rule-making contained in **2011 Wisconsin Act 32**, the 2011-13 Biennial Budget Act.

BACKGROUND

Chapter 227, Stats., contains the statutory provisions governing state agency rule-making authority, the process by which agencies promulgate administrative rules, and the role of the Legislature in reviewing proposed rules. An “administrative rule” is a regulation, standard, policy statement, or order of general application promulgated by a state agency. Administrative rules have the force and effect of law. Generally, state agencies issue rules to implement, interpret, or make specific provisions of statutes that are enforced or administered by the agency or to establish procedures for the agency to follow in administering its programs. However, the statutes also specify over 50 administrative actions that are exempt from rule-making.

2011 Wisconsin Act 21 makes significant changes to state agency authority to promulgate rules and requires that scope statements and final draft rules be approved by the Governor. It also requires that all state agencies prepare an economic impact analysis of every proposed rule. The Act also modifies laws relating to legislative review of proposed rules and judicial review of the validity of an administrative rule. **2011 Wisconsin Act 32** exempts several additional actions from rule-making, makes a technical clarification regarding the gubernatorial approval process for emergency rules, and provides specific instructions for rule-making regarding rules that increase dwelling construction costs.

AGENCY AUTHORITY TO PROMULGATE RULES

Prior to Act 21, Wisconsin law required an agency to promulgate, as a rule, each general policy statement and each interpretation of a statute that the agency specifically adopted to govern its administration or enforcement of that statute. A mere statement of policy or an interpretation of a statute made in an agency decision in a particular matter with a specific set of facts did not make the statement or interpretation a “rule” and did not require rule promulgation. Rule-making authority was expressly conferred on an agency to promulgate, as a rule, a general interpretation of a statute that it enforced or administered, if the agency considered it necessary to effectuate the purpose of the statute and if the rule did not exceed the bounds of correct interpretation.

Act 21 limits state agency rule-making authority by providing that all of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

- An agency may not find rule-making authority in a legislative statement of intent, purpose, findings, or policy, or in a statutory provision describing the agency’s general powers or duties. Rather, the agency is limited to rule-making authority that is explicitly conferred on the agency by the Legislature.
- An agency may not impose any standard, requirement, or threshold in a rule or as a license condition unless the standard, requirement, or threshold is explicitly required or permitted by statute or by another properly promulgated rule.
- With respect to a specific standard, requirement, or threshold, an agency may not promulgate a rule that is more restrictive than a statute.

Act 21 authorizes the Governor to prescribe, by executive order, guidelines to ensure that rules are promulgated in compliance with these requirements.

RULE PROMULGATION PROCESS

SCOPE STATEMENT

Prior to Act 21, Wisconsin law required an agency to prepare, and publish in the Wisconsin Administrative Register, a statement of the scope of any rule it planned to promulgate. The scope statement would include a discussion of the objective of the rule, existing and new policies relevant to the rule, the statutory authority for the rule, an estimate of the resources necessary to develop the rule, and a description of all of the entities that might be affected by the rule. The scope statement was developed and submitted to the individual or body in the agency (“agency decision-maker”) with policy-making powers over the subject matter of the rule. It would also be sent to the Legislative Reference Bureau (LRB) for publication in the Wisconsin Administrative Register. Under a system of passive review, the scope statement would be considered approved if the agency decision-maker did not disapprove it within 30 days. No rule drafting could take place until the scope statement was approved. The

requirement for a scope statement did *not* apply to emergency rules, which took effect, without pre-promulgation review, upon publication in the official state newspaper.

Under Act 21, passive review by the agency decision-maker is eliminated so that the agency decision-maker must affirmatively approve the scope statement. Further, the agency must submit the scope statement to the Governor for approval. These requirements also pertain to emergency rules. The agency must obtain the Governor's written approval before the scope statement may be sent to the LRB for publication. The agency cannot go forward with publication of the scope statement, or rule drafting, until such approval is obtained in writing. The agency cannot act on the scope statement until it has been published in the Administrative Register for 10 days.

Act 21 does not specify any timeframe for the Governor's approval. If the Governor approves a scope statement, the agency then sends the statement to the LRB for publication, as well as a copy to the Secretary of the Department of Administration (DOA).

If, after a scope statement is approved, the agency changes the scope in any meaningful or measurable way, so as to include in the scope any activity, business, material, or product that is not specifically included in the original scope, the agency must prepare and obtain approval of a revised scope statement before proceeding to draft the rule.

ECONOMIC IMPACT ANALYSES

Prior to Act 21, five state agencies were required to prepare an economic impact report for a proposed rule in specified circumstances, before submitting the rule to the Legislative Council staff for review.

Act 21 requires *all* agencies to prepare an economic impact *analysis* for every proposed rule before the rule is submitted to the Legislative Council staff for review. This requirement does *not* apply to emergency rules. The analysis must include information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state's economy as a whole.

In preparing the analysis, the agency must solicit information and advice from businesses, associations representing businesses, local governmental units, and individuals that may be affected by the proposed rule and must prepare the analysis in coordination with local governmental units that may be affected by the proposed rule. The analysis must include all of the following:

- An analysis and quantification of the policy problem that the proposed rule is intending to address, including comparisons with the approaches used by the federal government and by Illinois, Iowa, Michigan, and Minnesota to address that policy problem and any reasons why the agency chose a different approach.
- An analysis and detailed quantification of the economic impact of the proposed rule, including the implementation and compliance costs that are reasonably expected to be incurred by or passed along to the businesses, local governmental units, and individuals that may be affected by the proposed rule.

- An analysis of the actual and quantifiable benefits of the proposed rule, including an assessment of how effective the proposed rule will be in addressing the policy problem that the rule it is intended to address.
- An analysis of alternatives to the proposed rule, including the alternative of not promulgating the proposed rule.
- A determination made in consultation with the businesses, local governmental units, and individuals that may be affected by the proposed rule as to whether the proposed rule would adversely affect in a material way the economy, a sector of the economy, productivity, jobs, or the overall economic competitiveness of this state.

On the same day that the agency submits the economic impact analysis to the Legislative Council staff along with a proposed rule, the agency must also submit the analysis to DOA, the Governor, and the chief clerk of each house of the Legislature for further distribution within the Legislature.

If a proposed rule is modified after the economic impact analysis is submitted so that the economic impact of the proposed rule is significantly changed, the agency must prepare a revised economic impact analysis for the proposed rule as modified and submit the revised analysis in the same manner as the original. If an economic impact analysis regarding a proposed rule indicates that a total of \$20,000,000 or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses, local governmental units, and individuals as a result of the proposed rule, DOA must review the proposed rule and issue a report. The agency may not submit a proposed rule to the Legislature for review until the agency receives a copy of the department's report and the approval of the Secretary of Administration.

While in most respects, the analysis is more extensive in its scope than the former economic impact reports, Act 21 eliminates the requirement to include in the analysis a discussion of the risks to public health and the environment that the proposed rule is intended to address.

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REVIEW

The Legislative Council serves as the Administrative Rules Clearinghouse. Act 21 makes no substantive change to the requirement that an agency must submit a proposed rule to the Rules Clearinghouse for review. Act 21 requires that when the agency submits the proposed rule to the Clearinghouse, it must also submit its economic impact analysis of the rule. The Legislative Council must either post or provide a link to the analysis and any revised analysis on its Clearinghouse Rules Internet site.

Agencies must submit proposed rules to the Clearinghouse for review prior to holding a public hearing on a rule or, if no hearing is required, prior to submitting the final draft rule to the Governor for approval. The requirement for Clearinghouse review does *not* apply to emergency rules.

When an agency refers a proposed rule to the Legislative Council, the rule is assigned a Clearinghouse Rule number and is reviewed by a Legislative Council attorney or analyst for all of the following:

- Statutory authority under which the agency intends to promulgate the rule.
- Form, style and placement in the administrative code.
- Conflict with or duplication of existing rules.
- Adequacy of references to related statutes, rules, and forms.
- Clarity, grammar, punctuation, and use of plain language.
- Potential conflicts with and comparability to related federal laws and regulations.
- Compliance with permit action deadline requirements.

The Clearinghouse has 20 working days to review the rule and submit a Clearinghouse Report to the agency with its comments. In rare situations, an additional 20-day review period may be approved.

AGENCY PUBLIC HEARING

Generally, an agency must provide notice and hold a public hearing on a proposed rule. Notice may be posted before the agency receives the Clearinghouse report, but the hearing cannot take place until the agency has the report in hand. There are some exceptions to the hearing requirement. For example, a public hearing is *not* required prior to promulgation of emergency rules. Act 21 does not modify the provisions governing when a hearing must be held. The agency's notice of public hearing must include a number of items, including the text of the proposed rule and, under Act 21, the economic impact analysis and any DOA report prepared regarding the analysis, or a synopsis of it.

SUBMISSION OF FINAL DRAFT RULE TO GOVERNOR

Following the public hearing on a proposed rule, the agency finalizes the rule. Prior to Act 21, when the rule was in final draft form, the agency would send the final proposed rule and an accompanying report to the chief clerk in each house of the Legislature, for referral to a standing committee in each house.

Under Act 21, the agency must first submit the final draft rule to the Governor for approval, prior to submitting it to the Legislature. This requirement also applies to emergency rules. The Governor may approve or disapprove the rule. The Governor must provide written approval to the agency before the agency may submit the rule to the Legislature. There is no timeframe specified within which the Governor must act.

LEGISLATIVE REVIEW OF PROPOSED RULES

Standing Committee Review

Once the Governor has approved a final draft rule, the agency submits the rule, accompanied by a report, to the chief clerk of each house of the Legislature for referral to a standing committee in each house. Act 21 does not modify provisions on standing committee review of rules. Generally, a standing committee in each house has 30 days to review a rule. Within that time period, each committee may: (1) take no action or waive their jurisdiction over the rule and allow the agency to continue with promulgation; (2) enter into agreement with the agency to make modifications to the rule; or (3) object to all or part of a proposed rule.

If the agency agrees in writing to consider making modifications, the review period is extended for both standing committees for 10 days from the time the modifications are received. An agency may also submit germane modifications on its own. Modifications are accepted under passive review.

If the committee objects to all or part of a rule, it may do so *only* for one or more of the following reasons:

- Absence of statutory authority.
- Emergency relating to public health, safety, or welfare.
- Failure to comply with legislative intent.
- Conflict with state law.
- Change in circumstances since enactment of the earliest law on which the proposed rule is based.
- Arbitrariness or capriciousness, or imposition of an undue hardship.

JCRAR Review

Prior to Act 21, if the two standing committees took no action during their review periods or if they waived jurisdiction over the rule sooner, that was the end of the legislative review and the agency could proceed to promulgate the rule. A rule would receive further legislative review by the Joint Committee for Review of Administrative Rules (JCRAR) only if a standing committee objected to all or a portion of a rule. JCRAR could, in effect, take the same actions that a standing committee could take: (1) no action or waiver of jurisdiction; (2) modification agreement; or (3) objection. If JCRAR objected to a rule, it had to introduce a bill in each house that, if enacted, would sustain its objection and prevent promulgation of the rule. If both bills were defeated or otherwise failed to be enacted, the agency could proceed to promulgate the rule.

Act 21, in addition to clarifying some timing issues relating to committee review periods, makes a significant change and requires that *every* rule be referred to JCRAR, regardless of whether a standing committee has objected to the rule or a part of the rule.

The review period for JCRAR is 30 days, unless extended by action of the JCRAR co-chairs to consider modifications. During that review period, JCRAR's review is *de novo* and the committee may take any action on the proposed rule in whole or in part. JCRAR has passive review over rules which did not receive a standing committee objection. However, JCRAR *must* meet and take action during that period with respect to a rule or part of a rule to which a standing committee has objected.

In addition to requesting modifications to a rule, JCRAR may take any of the following actions during its review period:

1. Nonconcur in a committee's objection to a rule or part of a rule.
2. Concur in a committee's approval of a rule or part of a rule.
3. Otherwise approve a rule.
4. Waive its jurisdiction.
5. Object to a rule or part of a rule for the same reasons for which a standing committee may object.

If JCRAR objects to a rule or part of a rule, it must take executive action within 30 days regarding introduction in each house of a bill to support the objection.

SUBMISSION OF RULES TO LEGISLATURE LATE IN SESSION

Act 21 modifies requirements pertaining to referral of rules to the Legislature late in a legislative session. Act 21 provides that a notice of a proposed rule that is received by the Legislature for committee review after the last day of the Legislature's final general business floorperiod in the biennial session will be considered received on the first day of the next regular session of the Legislature, unless the presiding officers of both houses direct referral of the rule before that day. For 2012, the last day of the final general business floorperiod is March 15.

EMERGENCY RULES

Act 21 requires that an agency prepare a statement of the scope of a proposed emergency rule and obtain approval of the statement by the Governor and the individual or body with policy-making powers over the subject matter of the emergency rule. If the agency changes the scope of a proposed emergency rule, the agency must prepare and obtain approval of a revised scope statement. In addition, the Act requires that an agency submit a proposed emergency rule in final draft form to the Governor for approval. The Governor may approve or reject a proposed emergency rule. If the Governor approves a proposed emergency rule, the Governor must provide the agency with a written notice of that approval.

In addition, Act 21 provides that economic impact analyses are *not* required for emergency rules.

JUDICIAL REVIEW OF ADMINISTRATIVE RULES

Prior to Act 21, venue in an action for a declaratory judgment as to the validity of an administrative rule would generally be in Dane County. Act 21 provides that the exclusive means of judicial review of the validity of a rule is an action for declaratory judgment as to the validity of the rule brought in the circuit court for the county where the party asserting the invalidity of the rule resides or has its principal place of business. If that party is a nonresident or does not have its principal place of business in Wisconsin, venue is in the circuit court in the county in which the dispute arose.

Act 21 requires that when a circuit court enters a final order in a declaratory judgment action on the validity of a rule, the court must notify the LRB of the court's determination as to the validity or invalidity of the rule. The LRB must publish a notice of that determination in the Wisconsin Administrative Register and insert an annotation of that determination in the Wisconsin Administrative Code.

INITIAL APPLICABILITY

Agency authority. The provisions of Act 21 relating to agency authority to promulgate rules first apply to a proposed rule submitted to the Legislative Council staff for review on the effective date of the Act.

Governor's approval of scope statement. The provisions of Act 21 relating to approval by the Governor of the statement of scope for a proposed rule or emergency rule first apply to a proposed rule or emergency rule whose statement of scope is submitted on the effective date of the Act.

Economic impact analysis. The provisions of Act 21 relating to preparation and submission of an economic impact analysis first apply to a proposed rule submitted to the Legislative Council staff for review on the effective date of the Act.

Governor's approval of final draft rule. The provisions of Act 21 relating to approval by the Governor of a final draft rule or emergency rule first apply to a proposed rule or emergency rule whose scope statement is presented to the Governor for approval on the effective date of the Act.

Legislative review of final draft rules. The provisions of Act 21 relating to legislative committee review of final draft rules first applies to a proposed rule submitted to the Legislature for referral to standing committees on the effective date of the Act.

Venue in action challenging validity of rule. The provisions of Act 21 relating to venue in declaratory judgment actions first applies to an action for declaratory judgment commenced on the effective date of the Act.

IMPLEMENTATION OF ACT 21

In a memorandum to state agency heads dated July 19, 2011, DOA Secretary Mike Huebsch provided initial implementation guidance regarding completion and transmittal of scope statements and final draft rules, including emergency rules, for approval by the Governor, as well as guidance on completing and submitting economic impact analyses.

The memorandum indicates that the Governor will be issuing an executive order to provide comprehensive guidance to agencies regarding compliance with the new Act 21 requirements. As of the date of this Information Memorandum, the executive order has not been issued.

Agencies are directed to refer to instructions and templates for agency scope statements and economic impact analyses on the State Budget Office's SharePoint site. Agencies are to follow the document naming conventions in these instructions and to e-mail all documents to the State Budget Office. The memorandum indicates that the Governor's office and State Budget Office will act expeditiously to review agency submittals, with most being acted on within a few days. More complex rules may require additional information and follow-up.

The Governor's office has indicated that submission of scope statements, final draft rules, and economic impact analyses to the State Budget Office, as directed in the July 19, 2011 memorandum, fulfills an agency's duty under Act 21 to submit those materials to the Governor.

Agencies may direct questions regarding the administrative rule process to Jodi Jensen in the Governor's office (266-7493) or to the agency's assigned state budget analyst, or e-mail the Governor's office about issues relating to rule promulgation at GovAdministrativeRules@wisconsin.gov. The Governor's website has a link to information about administrative rules under the "Contact" tab.

Finally, the memorandum states that agencies should continue to follow instructions provided by the Legislative Reference Bureau and the Legislative Council staff regarding preparation and transmittal of documents involved in the rule promulgation process.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Pam Shannon, Senior Staff Attorney and Director, Administrative Rules Clearinghouse, on August 30, 2011.

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