

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1852/P1dn

JK/RN/PD/RK/JO/PK/PN:kmg:ch

January 19, 1999

***Untrue, deceptive or misleading statements***

Please note the changes that I made in s. 100.261 (4), as created in this draft. I rewrote that provision for clarity purposes only. The changes do not affect the substance or intent of the provision.

Robin N. Kite  
Legislative Attorney  
266-7291

***Year 2000 impact statements***

The standard for triggering the requirement for a year 2000 impact statement requires a "significant impact". I'm not sure whether either the LRB or DOA can accurately make that determination at the time of introduction.

The language of proposed s. 13.0992 (2) to the effect "that a bill for which a year 2000 impact statement is required or requested may not be heard or reported by a standing committee to which the bill is referred until the statement is received" creates a rule of procedure under article IV, section 8, of the constitution. The supreme court has held that the remedy for noncompliance with this type of provision lies exclusively within the legislative branch. See *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 363-369 (1983). In other words, while this type of provision may be effective to govern internal legislative procedure, the courts will not enforce this type of provision and it does not affect the validity of any enactment resulting from a procedure that may be viewed as contravening the provision.

Atty. Peter J. Dykman  
Deputy Chief  
266-7098

***Admissibility of year 2000 and leap year processing statements***

I redrafted this proposal with some changes. Wisconsin statutes do not use the term "reckless indifference". I changed that term to what is used in Wisconsin: "reckless

disregard". I left out the term "entity" because it adds nothing to the meaning of the draft and is confusing if you look at what it means in a dictionary. (An independent being or existence.) Subsection (1) (b) 4. was added although I cannot find anything like it in the federal law.

I had the same problem with sub. (3) (c), which I added as requested, except that this exception creates other problems. This language seems to remove the immunity from everyone, because everyone is going to be compensated for issuing a year 2000 statement. That will be part of the person's job. This language has to be narrowed in some way, but since I do not know your intent, I did not know how to narrow the language.

There appears to be one discrepancy between this draft and LRBs0002. This draft allows the use of a year 2000 statement (which is defined) made by a person who knew the statement was false.... LRBs0002 prohibits a person from making any year 2000 statement (which is not defined as in LRB-1118) which is false.... The definitions create some ambiguity and the knowledge of the person is important in LRB-1118, but not in LRBs0002. Is this okay?

### ***Testing of contingency emergency planning***

Please note that s. 16.47 (2), stats., states that neither house may pass any bill containing an appropriation, increasing the cost of state government or decreasing state revenues by more than \$10,000 annually until both houses pass the executive budget bill, except that the governor or joint committee on finance or, under certain circumstances, the committee on organization of either house may enact emergency appropriation bills prior to the passage of the executive budget bill.

Note that if this bill is introduced and enacted as an emergency measure prior to passage of the budget, the appropriation set forth in this bill will be repealed by action of the budget bill (which repeals and recreates the appropriations schedule).

Robert P. Nelson  
Senior Legislative Attorney  
267-7511

### ***Information gathering***

1. This draft does not prescribe a penalty for a violation of proposed s. 134.92 (2) by any person who is ordered to provide a 'Y2K' statement; it only prescribes a penalty for an officer, employe or agent, other than a director, of such a person. Is this consistent with your intent? Do you wish to limit the scope of proposed s. 134.92 to persons other than individuals?

2. I did not provide a penalty for failure to provide access to private records, corresponding to the penalty prescribed under s. 196.65 (3) (b) 5., stats., because the draft does not authorize authorities to examine such records. If you intend to permit authorities to examine such records, please let me know. If you do, you may wish to grant them subpoena powers.

3. The instructions did not specify whether access to 'Y2K' information by DOA is to be authorized or required. This draft provides, in proposed s. 134.92 (4) (b), that access to such information by DOA is mandatory if DOA requests access.

4. I have not used the term "special year 2000 data gathering request" in this draft because I did not find it necessary or expedient to use it and also because the term as used in federal law refers to an order rather than a request.

5. This draft incorporates the substance of the federal terms "year 2000 statement" and "year 2000 processing". Note that these terms are very broad, and have the effect of extending the scope of the draft to apply to noncomputer issues.

Application of a penalty to individuals who do not participate in an offense under proposed s. 134.92 (3) (b) may not be enforceable in this state under *Elections Board v. Ward*, 105 Wis.2d 543 (1982). However, this principle should not impair the validity of this paragraph as applied to participants in an offense.

With respect to your concern that 'Y2K' statements should relate only to matters that may contain a 'Y2K' error, the definition of a "year 2000 statement" in proposed s. 134.92 (1) (f) is limited only to matters relating to "year 2000 processing", which is defined in proposed s. 134.92 (1) (e). This language is essentially taken from the federal law. The federal law is broadly drafted. The language in LRB-1091/4 is more specifically directed at computer failures. However, I did not use this language because I understood that you wanted the statements provided for in this draft to correspond to the federal statements so that potentially the same statements can be used to comply with both federal and state law.

1. This draft includes the change you requested which limits the scope of the evidentiary provision to civil actions and proceedings only.

2. Concerning the change that was made in LRB-1090/6 in the definition of "Year 2000 processing", I realize this change reflects the federal text but I intentionally departed from that text because syntactically it doesn't work. Because "calculating" is included in the definition of "processing" the text results in the following: "'Year 2000 processing' means the [calculating, comparing, sequencing, displaying, storing], transmitting or receiving of date data ... from leap year calculations". Also, the federal language extends the scope of the draft beyond the 'Y2K' issue to apply to all leap year calculations regardless of the year to which they apply, past or future. As a result, the relating clause of the draft is no longer accurate. This issue is also present in the other drafts employing this language.

### ***Liability for processing failures***

1. Unlike the other 'Y2K' drafts, this draft does not necessarily cover all incorrect dates occurring after the year 2000 because of a year 2000-type failure. For example, it would not cover a date in the year 1901 that is incorrectly substituted for a date in the year 2001 unless the substitution is caused by the failure of a computing device to recognize, process, distinguish or interpret the year 2000. Also, unlike the other drafts, this draft covers only reactive 'Y2K' errors (recognition, processing, distinguishing or interpretation) as opposed to initiation errors (production, generation, calculation). Please let me know if this is not in accord with your intent.

2. This draft initially applies to liability incurred under contracts entered into, extended, modified or renewed on its effective date (so as not to impair preexisting contracts) and to noncontractual injuries occurring on its effective date (so as not to raise a due process issue by retroactively shifting liability for injuries that have already occurred). Please let me know if you intend otherwise.

3. Currently, the major exception to the sovereign immunity bar against state governmental units is to assert that a state governmental officer, employe or agent was negligent in the performance of a ministerial (nondiscretionary) duty. A state or local governmental officer, employe or agent will generally not be found negligent if the officer, employe or agent can show that he or she made a good faith attempt to resolve the problem that results in the allegedly negligent act or omission. This draft overlays this rule of law with a new rule that is narrower, for purposes of certain 'Y2K'-related acts or omissions, in that "good faith" means: a) a remediation plan; and b) a reasonable effort to find and rectify flawed chips. This may have the effect of limiting a finding of good faith under these circumstances if these two elements are not present.

4. You may also wish to consider the following collateral issues:

a. Currently, the state or a local governmental unit may, by contract, absolve itself of 'Y2K' liability. The party with whom the unit contracts must then assume the 'Y2K' risk of the governmental unit. This draft eliminates that option. In some cases, this will mean that the cost of this risk is passed back to the governmental unit by way of increased costs for goods or services provided. Because the party with whom the unit contracts has no way of knowing what the unit's 'Y2K' exposure is, it is possible that it will cost that exposure on the basis of a worst case assumption. If the governmental unit is reasonably confident that it has little or no 'Y2K' exposure, it may therefore find it advantageous not to shift its contractual 'Y2K' liability in order to obtain the best possible price for goods or services.

b. In litigation, damages are of 3 types: 1) general or compensatory (direct, out-of-pocket damages); 2) consequential (indirect damages such as lost profits or increased borrowing costs); and 3) punitive or exemplary (damages awarded as punishment for wrongful conduct). Under ss. 893.80 (3) and 893.82 (6), stats., punitive damages are not recoverable against a local government or a state or local governmental officer, employe or agent. General damages may include payments to which an injured party is now legally entitled such as a governmental benefit or payment in the ordinary course of business. It is possible that denial of all general damages may not be constitutionally enforceable. You may therefore wish to consider limiting 'Y2K' liability for consequential damages only.

c. Under ss. 16.528 and 66.285, stats., the state and local governments must pay interest on payments that are made late as a result of a 'Y2K' problem. This draft deletes this requirement in the situation covered by the draft because where there is no liability there is no liability for interest. Under ss. 814.04 (4) and 815.05 (8), stats., interest is generally recoverable in civil lawsuits from the time that a verdict or decision is made for the recovery of money, or in some cases from the time that offer of settlement is not accepted, until the judgment is paid (recovery of interest in lawsuits against the state is more limited). This draft does not change these laws. Because

under this draft it is still possible to recover damages in some ‘Y2K’ situations, you may wish to provide an exemption for interest recovery in those situations.

d. You may wish to consider placing an expiration (sunset) date on the liability limitation created by this draft in order to provide an incentive for governmental units to remedy ‘Y2K’ problems within a reasonable period.

Concerning the definition of “remediation plan”, as mentioned in the drafter’s note to LRB-1090/7, because “calculate” is included in the definition of “process”, the text results in the following: “‘Remediation plan’ means a written document ... developed to implement changes to ensure that electronic computing devices will accurately [calculate, compare, sequence, display, store], transmit and receive data ... from leap year calculations.” The syntax in this sentence needs to be corrected. Also, this language extends the scope of the draft beyond the “Y2K” issue to apply to all leap year calculations regardless of the year to which they apply, past or future. As a result, the relating clause of the draft is no longer accurate.

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