

2003 ASSEMBLY BILL 267

April 15, 2003 – Introduced by Representatives McCORMICK, ALBERS, BALOW, BIES, J. FITZGERALD, FRISKE, GUNDERSON, HAHN, HINES, HUNDERTMARK, KRAWCZYK, KREIBICH, LADWIG, LASSA, MUSSER, NISCHKE, OLSEN, OTT, PETTIS, PLALE, POWERS, SCHOOFF, SERATTI, STASKUNAS, STONE, SUDER, UNDERHEIM, VAN ROY, VRAKAS, WIECKERT, J. WOOD and ZIEGELBAUER, cosponsored by Senators BROWN, S. FITZGERALD, KANAVAS, LAZICH, LEIBHAM, REYNOLDS, ROESSLER, SCHULTZ, STEPP and WELCH. Referred to Committee on Small Business.

1 **AN ACT** *to amend* 227.114 (1) (a), 227.114 (2) (intro.), 227.485 (2) (c) and 814.245
2 (5) (a) 2.; and *to create* 15.155 (5), 227.114 (6m), 227.114 (7m), 227.135 (1) (e),
3 227.14 (2m), 227.14 (2t), 227.15 (1m), 227.19 (3r), 227.22 (2) (e), 227.24 (3m),
4 227.30, 227.40 (2) (f) and 895.59 of the statutes; **relating to:** administrative
5 rule making regarding small businesses, data used by administrative agencies
6 in preparing proposed rules, increasing attorney fees, creating an Internet site
7 for proposed rules, and creating a Small Business Regulatory Review Board.

Analysis by the Legislative Reference Bureau

Under current law, an agency that proposes an administrative rule that affects small businesses (a business that employs fewer than 25 full-time employees or has gross annual sales of less than \$2,500,000), is required to consider ways to reduce the impact of the rule on small businesses, including creating less stringent compliance requirements for small businesses or exempting small businesses from the rule. Currently, the agency proposing the rule must give small businesses the opportunity to participate in the rule-making process. Agencies are also currently required to prepare a regulatory flexibility analysis of any rule that affects a small business, including a summary of changes made in the rule as a result of suggestions by small businesses and the estimated costs that small businesses may incur to comply with the proposed rule.

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This bill creates a Small Business Regulatory Review Board and requires an agency to submit to that board any proposed rule that may have a significant economic impact on small businesses. The board is authorized to analyze the rule and notify the proposing agency if the board determines that the agency failed to consider ways to reduce the proposed rule's impact on small businesses or failed to properly prepare the regulatory flexibility analysis. The board may suggest ways that the agency can modify the rule and may return the rule to the agency if the rule does not detail how the rule will be enforced.

The bill redefines "small business" to include any business with 25 or fewer employees or with gross annual sales of less than \$5,000,000. The bill requires every agency, in cooperation with the Department of Administration, to ensure the accuracy, integrity, and consistency of the data that the agency uses when preparing a proposed rule. The bill gives small businesses the right to seek an injunction against the imposition of a penalty from an agency resulting from the small business's action that was in response to inaccurate information provided by the agency.

The bill requires the Joint Legislative Council to create an Internet site that includes a copy of each proposed rule that is submitted to the council. The site must be searchable and include a section devoted to proposed rules affecting small businesses, an electronic address and telephone number of an agency contact for a rule, the council's report on the proposed rule, the time and place of any public hearing on the proposed rule, and the place where comments may be submitted regarding a proposed rule.

The bill requires every state agency to review all of its rules during the next five years to determine if any of the rules place an unnecessary burden on small businesses, and to repeal or amend any rules that do so.

The bill also gives immunity from imposition of a penalty to any small business that voluntarily discloses information to the appropriate agency about a possible violation of an administrative rule if a number of conditions are met, including the business making the disclosure within 45 days after learning of the violation, making a good faith effort to comply with the rule, and cooperating with the agency in any resulting investigation. The immunity does not apply if the violation resulted in serious harm or in a substantial economic benefit to the violator which gave the violator an advantage over its business competitors.

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

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

- 1 **SECTION 1.** 15.155 (5) of the statutes is created to read:
- 2 15.155 (5) SMALL BUSINESS REGULATORY REVIEW BOARD. There is created a small
- 3 business regulatory review board, attached to the department of commerce under s.

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1 15.03. The board shall consist of a representative of the department of
2 administration, a representative of the department of agriculture, trade and
3 consumer protection, a representative of the department of commerce, a
4 representative of the department of natural resources, 5 representatives of small
5 businesses, as defined in s. 227.114 (1), who shall be appointed for 3-year terms, and
6 the chairpersons of one senate and one assembly committee concerned with small
7 businesses. The representatives of the departments shall be selected by the
8 secretary of that department.

9 **SECTION 2.** 227.114 (1) (a) of the statutes is amended to read:

10 227.114 (1) (a) In this section, “small business” means a business entity,
11 including its affiliates, which is independently owned and operated and not
12 dominant in its field, and which employs 25 or fewer than 25 full-time employees or
13 which has gross annual sales of less than \$2,500,000. ~~For purposes of a specific rule,~~
14 ~~an agency may define small business to include more employees or greater gross~~
15 ~~annual sales if necessary to adapt the rule to the needs and problems of small~~
16 ~~businesses. A “small business” may also be defined in accordance with other~~
17 ~~standards established by an agency by rule \$5,000,000.~~

18 **SECTION 3.** 227.114 (2) (intro.) of the statutes is amended to read:

19 227.114 (2) (intro.) When an agency proposes or revises a rule that may have
20 an effect on small businesses, the agency shall consider each of the following methods
21 for reducing the impact of the rule on small businesses:

22 **SECTION 4.** 227.114 (6m) of the statutes is created to read:

23 227.114 (6m) If a small business is subject to a penalty from an administrative
24 agency as the result of an action or omission by the small business in response to
25 inaccurate or inconsistent advice given to the small business by an employee, officer,

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1 or agent of the agency, the small business may commence an action in the circuit
2 court for Dane County for injunctive relief. The circuit court may issue an order
3 enjoining the imposition of the penalty if the court determines that the action or
4 omission of the small business that resulted in the penalty was in response to the
5 agency's inaccurate or inconsistent advice.

6 **SECTION 5.** 227.114 (7m) of the statutes is created to read:

7 227.114 (7m) The agency shall designate a small business regulatory
8 coordinator to act as a contact person for small business regulatory issues. The
9 agency shall include in the notice under s. 227.17 the electronic mail address and
10 telephone number of the small business regulatory coordinator and a link to an
11 Internet site that allows a person to review the rule and make comments regarding
12 the rule.

13 **SECTION 6.** 227.135 (1) (e) of the statutes is created to read:

14 227.135 (1) (e) A description of all of the entities that will be affected by the rule.

15 **SECTION 7.** 227.14 (2m) of the statutes is created to read:

16 227.14 (2m) **QUALITY OF AGENCY DATA.** Each agency shall, in cooperation with
17 the department of administration, ensure the accuracy, integrity, and consistency of
18 the data that is used when preparing a proposed rule and when completing an
19 analysis of the proposed rule under sub. (2). Each agency shall reduce the amount
20 of cross-references to the statutes in proposed and final rules. A person affected by
21 the proposed rule may submit comments to the agency regarding the accuracy,
22 integrity, or consistency of that data.

23 **SECTION 8.** 227.14 (2t) of the statutes is created to read:

24 227.14 (2t) **ENFORCEMENT PROVISIONS.** Except as provided in subs. (1m) and (1s),
25 each proposed rule shall include provisions detailing how the rule will be enforced.

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1 If a proposed rule does not include enforcement provisions, the small business
2 regulatory review board may return the rule to the submitting agency for an
3 appropriate enforcement provision.

4 **SECTION 9.** 227.15 (1m) of the statutes is created to read:

5 227.15 (1m) INTERNET ACCESS TO PROPOSED RULE. The joint legislative council
6 shall create and maintain an Internet site that includes a copy of each proposed rule
7 received under sub. (1) in a format that allows the site to be searched using keywords.
8 Each agency shall provide the joint legislative council with the proposed rules and
9 other information needed to comply with this subsection in the format required by
10 the joint legislative council. The Internet site shall include a section devoted to
11 proposed rules affecting small businesses, as defined in s. 227.114 (1). The Internet
12 site shall also include all of the following:

13 (a) The electronic mail address and telephone number of an agency contact
14 person for each proposed rule.

15 (b) The material required under s. 227.14 (2), (3), and (4).

16 (c) The written report of the legislative council staff review of the proposed rule
17 prepared under sub. (2) and any agency comments regarding that report.

18 (d) The time, date, and place of any public hearing specified in the notice in s.
19 227.17 as soon as that notice is submitted to the revisor of statutes under s. 227.17
20 (1) (a).

21 (e) The place where comments on the proposed rule should be submitted and
22 the deadline for submitting those comments.

23 **SECTION 10.** 227.19 (3r) of the statutes is created to read:

24 227.19 (3r) FISCAL EFFECT OF EMERGENCY RULE. On the same day that an agency
25 submits a notice under sub. (2) regarding a proposed rule that may have a significant

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1 economic impact on small businesses, the agency shall submit the proposed rule and
2 the report required under sub. (3) to the small business regulatory review board. The
3 board may use cost-benefit analysis to determine the fiscal effect of the emergency
4 rule on small businesses and shall determine whether the agency has complied with
5 sub. (3) (e) or s. 227.114. If the board determines that the agency failed to comply with
6 sub. (3) (e) or s. 227.114, the board shall notify the agency of that determination and
7 ask the agency to comply with those provisions. In addition, the board may submit
8 suggested changes in the proposed rule to the agency, including proposals to reduce
9 the use of cross-references in the rule. The board shall send a copy of any suggestions
10 and of any notice of failure to comply with sub. (3) (e) or s. 227.114 to each committee
11 to which the proposed rule was referred under sub. (2). The notification of
12 noncompliance may include a request that the agency do any of the following:

13 (a) Explain why the agency has not incorporated comments received from small
14 businesses regarding the proposed rule.

15 (b) Verify that the proposed rule does not conflict with, overlap, or duplicate
16 other rules or federal regulations.

17 (c) Require the inclusion of fee information and fee schedules in the regulatory
18 flexibility analysis, including why fees are necessary and for what purpose the fees
19 will be used.

20 **SECTION 11.** 227.22 (2) (e) of the statutes is created to read:

21 227.22 (2) (e) The rule has a significant economic impact on small businesses,
22 as defined in s. 227.114 (1), in which case the rule applies to small businesses on the
23 first day of the 3rd month commencing after the date of publication.

24 **SECTION 12.** 227.24 (3m) of the statutes is created to read:

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1 **227.24 (3m)** REVIEW BY THE SMALL BUSINESS REGULATORY REVIEW BOARD. On the
2 same day that the agency files a rule under sub. (3) that may have a significant
3 economic impact on small businesses, as defined in s. 227.114 (1), the agency shall
4 submit a copy of the rule to the small business regulatory review board. The board
5 may use cost–benefit analysis to determine the fiscal effect of the emergency rule on
6 small businesses and shall determine whether the agency complied with s. 227.114
7 or 227.19 (3) (e). If the board determines that the agency failed to comply with s.
8 227.114 or 227.19 (3) (e), the board shall notify the agency of that determination and
9 ask the agency to comply with those provisions. In addition, the board may submit
10 suggested changes in the proposed rule to the agency. The notification of
11 noncompliance may include a request that the agency do any of the following:

12 (a) Explain why the agency has not incorporated comments received from small
13 businesses regarding the emergency rule.

14 (b) Verify that the emergency rule does not conflict with, overlap, or duplicate
15 other rules or federal regulations.

16 **SECTION 13.** 227.30 of the statutes is created to read:

17 **227.30 Review of administrative rules. (1)** Each agency shall, during the
18 5–year period beginning on the effective date of this subsection [revisor inserts
19 date], review the rules of the agency to determine whether any of those rules place
20 an unnecessary burden on the ability of small businesses, as defined in s. 227.114 (1),
21 to conduct their affairs. If an agency determines that a rule places an unnecessary
22 burden on the ability of a small business to conduct its affairs, the agency shall repeal
23 the rule or amend the rule to remove the unnecessary burden.

24 **(2)** In reviewing a rule under this section, the agency shall consider all of the
25 following:

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1 (a) The continued need for the rule.

2 (b) The nature of the complaints and comments received from the public
3 regarding the rule.

4 (c) The complexity of the rule.

5 (d) The extent to which the rule overlaps, duplicates, or conflicts with federal
6 regulations, other state rules, or local ordinances.

7 (e) The length of time since the rule has been evaluated.

8 (f) The degree to which technology, economic conditions, or other factors have
9 changed in the subject area affected by the rule since the rule was promulgated.

10 **(3)** The agency shall annually, on the first day of the 12th month beginning
11 after the effective date of this subsection [revisor inserts date], for the 5-year
12 period, submit a report to the legislature under s. 13.172 (2) describing the agency's
13 review of its rules and any actions taken regarding those rules during the previous
14 year. The agency shall send a copy of that report to the small business regulatory
15 review board.

16 **SECTION 14.** 227.40 (2) (f) of the statutes is created to read:

17 227.40 **(2)** (f) Proceedings under s. 227.114 (6m) or 227.14 (2t).

18 **SECTION 15.** 227.485 (2) (c) of the statutes is amended to read:

19 227.485 **(2)** (c) "Small business" means a business entity, including its
20 affiliates, which is independently owned and operated, and which employs fewer
21 than 25 full-time employees or which has gross annual sales of less than \$2,500,000
22 \$5,000,000.

23 **SECTION 16.** 814.245 (5) (a) 2. of the statutes is amended to read:

24 814.245 **(5)** (a) 2. Attorney or agent fees may not be awarded in excess of \$75
25 \$150 per hour unless the court determines that an increase in the cost of living or a

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1 special factor, such as the limited availability of qualified attorneys or agents,
2 justifies a higher fee.

3 **SECTION 17.** 895.59 of the statutes is created to read:

4 **895.59 Liability exemption; disclosure of rule violations. (1)** In this
5 section:

6 (a) “Agency” has the meaning given in s. 227.01 (1).

7 (b) “Small business” has the meaning given in s. 227.114 (1).

8 **(2)** A small business that voluntarily discloses information to the appropriate
9 agency about an actual or potential violation of an administrative rule shall be
10 immune from the imposition of a civil or criminal penalty that could be imposed for
11 the violation if all of the following apply.

12 (a) The voluntary disclosure is made within 45 days after the small business
13 knew that an actual or potential violation occurred.

14 (b) The small business making the disclosure initiates an appropriate and good
15 faith effort to achieve compliance with the administrative rule, pursues compliance
16 with due diligence and promptly corrects the noncompliance after discovery of the
17 violation.

18 (c) The small business cooperates with any reasonable request by the agency
19 in any investigation that results from the disclosure.

20 **(3)** A penalty may be imposed for the violation of an administrative rule
21 notwithstanding sub. (2) if any of the following applies:

22 (a) The violation resulted in serious harm or in imminent and substantial
23 endangerment to public health, safety, or welfare.

24 (b) The violation resulted in a substantial economic benefit that gave the
25 violator a clear advantage over its business competitors.

