

ENGROSSED 2003 ASSEMBLY BILL 267

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

Analysis by the Legislative Reference Bureau

Engrossment information:

The text of Engrossed 2003 Assembly Bill 267 consists of the bill, as affected by the following documents adopted in the assembly on October 2, 2003: the bill as affected by Assembly Amendment 1, Assembly Amendment 2, Assembly Amendment 3, and Assembly Amendment 7.

Content of Engrossed 2003 Assembly Bill 267:

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

ENGROSSED ASSEMBLY BILL 267

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.

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 or due to the failure of the agency to provide requested advice. For purposes of this provision, a small business does not include a child care institution, such as a day care center or shelter care facility, or an institution licensed by the Department of Health and Family Services to provide direct treatment services to clients.

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 and guidelines during the next five years to determine if any of the rules or guidelines place an unnecessary burden on small businesses, and to repeal or amend any rules or guidelines 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

ENGROSSED ASSEMBLY BILL 267

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 purposes of this provision, a small business does not include a child care institution, such as a day care center or shelter care facility, or an institution licensed by the Department of Health and Family Services to provide direct treatment services to clients.

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

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

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

ENGROSSED ASSEMBLY BILL 267**SECTION 2**

1 ~~businesses. A “small business” may also be defined in accordance with other~~
2 ~~standards established by an agency by rule \$5,000,000.~~

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

4 227.114 (2) (intro.) When an agency proposes or revises a rule that may have
5 an effect on small businesses, the agency shall consider each of the following methods
6 for reducing the impact of the rule on small businesses:

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

8 227.114 (6m) If a small business is subject to a penalty from an administrative
9 agency as the result of an action or omission by the small business due to the failure
10 by the agency to provide requested advice or in response to inaccurate or inconsistent
11 advice given to the small business by an employee, officer, or agent of the agency, the
12 small business may commence an action in the circuit court for Dane County for
13 injunctive relief. The circuit court may issue an order enjoining the imposition of the
14 penalty if the court determines that the action or omission of the small business that
15 resulted in the penalty was in response to the agency’s inaccurate or inconsistent
16 advice or failure of the agency to provide requested advice. Notwithstanding sub. (1)
17 (a), in this subsection, “small business” does not include an entity, as defined in s.
18 48.685 (1) (b) or 50.065 (1) (c).

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

20 227.114 (7m) The agency shall designate a small business regulatory
21 coordinator to act as a contact person for small business regulatory issues. The
22 agency shall include in the notice under s. 227.17 the electronic mail address and
23 telephone number of the small business regulatory coordinator and a link to an
24 Internet site that allows a person to review the rule and make comments regarding
25 the rule.

ENGROSSED ASSEMBLY BILL 267

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

2 227.135 **(1)** (e) A description of all of the entities that will be affected by the rule.

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

4 227.14 **(2m)** QUALITY OF AGENCY DATA. Each agency shall, in cooperation with
5 the department of administration, ensure the accuracy, integrity, and consistency of
6 the data that is used when preparing a proposed rule and when completing an
7 analysis of the proposed rule under sub. (2). Each agency shall reduce the amount
8 of cross-references to the statutes in proposed and final rules. A person affected by
9 the proposed rule may submit comments to the agency regarding the accuracy,
10 integrity, or consistency of that data.

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

12 227.14 **(2t)** ENFORCEMENT PROVISIONS. Except as provided in subs. (1m) and (1s),
13 each proposed rule shall include provisions detailing how the rule will be enforced.
14 If a proposed rule does not include enforcement provisions, the small business
15 regulatory review board may return the rule to the submitting agency for an
16 appropriate enforcement provision.

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

18 227.15 **(1m)** INTERNET ACCESS TO PROPOSED RULE. The joint legislative council
19 shall create and maintain an Internet site that includes a copy of each proposed rule
20 received under sub. (1) in a format that allows the site to be searched using keywords.
21 Each agency shall provide the joint legislative council with the proposed rules and
22 other information needed to comply with this subsection in the format required by
23 the joint legislative council. The Internet site shall include a section devoted to
24 proposed rules affecting small businesses, as defined in s. 227.114 (1). The Internet
25 site shall also include all of the following:

ENGROSSED ASSEMBLY BILL 267**SECTION 9**

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

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

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

6 (d) The time, date, and place of any public hearing specified in the notice in s.
7 227.17 as soon as that notice is submitted to the revisor of statutes under s. 227.17
8 (1) (a).

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

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

12 **227.19 (3r) FISCAL EFFECT OF RULE.** On the same day that an agency submits
13 a notice under sub. (2) regarding a proposed rule that may have a significant
14 economic impact on small businesses, the agency shall submit the proposed rule and
15 the report required under sub. (3) to the small business regulatory review board. The
16 board may use cost–benefit analysis to determine the fiscal effect of the rule on small
17 businesses and shall determine whether the agency has complied with sub. (3) (e) or
18 s. 227.114. If the board determines that the agency failed to comply with sub. (3) (e)
19 or s. 227.114, the board shall notify the agency of that determination and ask the
20 agency to comply with those provisions. In addition, the board may submit suggested
21 changes in the proposed rule to the agency, including proposals to reduce the use of
22 cross–references in the rule. The board shall send a copy of any suggestions and of
23 any notice of failure to comply with sub. (3) (e) or s. 227.114 to each committee to
24 which the proposed rule was referred under sub. (2). The notification of
25 noncompliance may include a request that the agency do any of the following:

ENGROSSED ASSEMBLY BILL 267

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

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

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

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

9 227.22 (2) (e) The rule has a significant economic impact on small businesses,
10 as defined in s. 227.114 (1), in which case the rule applies to small businesses on the
11 first day of the 3rd month commencing after the date of publication.

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

13 227.24 (3m) REVIEW BY THE SMALL BUSINESS REGULATORY REVIEW BOARD. On the
14 same day that the agency files a rule under sub. (3) that may have a significant
15 economic impact on small businesses, as defined in s. 227.114 (1), the agency shall
16 submit a copy of the rule to the small business regulatory review board. The board
17 may use cost–benefit analysis to determine the fiscal effect of the emergency rule on
18 small businesses and shall determine whether the agency complied with s. 227.114
19 or 227.19 (3) (e). If the board determines that the agency failed to comply with s.
20 227.114 or 227.19 (3) (e), the board shall notify the agency of that determination and
21 ask the agency to comply with those provisions. In addition, the board may submit
22 suggested changes in the proposed rule to the agency. The notification of
23 noncompliance may include a request that the agency do any of the following:

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

ENGROSSED ASSEMBLY BILL 267**SECTION 12**

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

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

4 **227.30 Review of administrative rules or guidelines. (1)** Each agency
5 shall, during the 5-year period beginning on the effective date of this subsection
6 [revisor inserts date], review the rules and guidelines of the agency to determine
7 whether any of those rules or guidelines place an unnecessary burden on the ability
8 of small businesses, as defined in s. 227.114 (1), to conduct their affairs. If an agency
9 determines that a rule or guideline places an unnecessary burden on the ability of
10 a small business to conduct its affairs, the agency shall repeal the rule or guideline
11 or amend the rule or guideline to remove the unnecessary burden.

12 **(2)** In reviewing a rule or guideline under this section, the agency shall consider
13 all of the following:

14 (a) The continued need for the rule or guideline.

15 (b) The nature of the complaints and comments received from the public
16 regarding the rule or guideline.

17 (c) The complexity of the rule or guideline.

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

20 (e) The length of time since the rule or guideline has been evaluated.

21 (f) The degree to which technology, economic conditions, or other factors have
22 changed in the subject area affected by the rule or guideline since the rule or
23 guideline was promulgated or established.

24 **(3)** The agency shall annually, on the first day of the 12th month beginning
25 after the effective date of this subsection [revisor inserts date], for the 5-year

ENGROSSED ASSEMBLY BILL 267

1 period, submit a report to the legislature under s. 13.172 (2) describing the agency's
2 review of its rules and guidelines and any actions taken regarding those rules or
3 guidelines during the previous year. The agency shall send a copy of that report to
4 the small business regulatory review board.

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

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

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

8 227.485 (2) (c) “Small business” means a business entity, including its
9 affiliates, which is independently owned and operated, and which employs 25 or
10 fewer ~~than 25~~ full-time employees or which has gross annual sales of less than
11 ~~\$2,500,000~~ \$5,000,000.

12 **SECTION 15t.** 814.245 (2) (b) of the statutes is amended to read:

13 814.245 (2) (b) “Small business” means a business entity, including its
14 affiliates, which is independently owned and operated, and which employs 25 or
15 fewer ~~than 25~~ full-time employees or which has gross annual sales of less than
16 ~~\$2,500,000~~ \$5,000,000.

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

18 814.245 (5) (a) 2. Attorney or agent fees may not be awarded in excess of \$75
19 \$150 per hour unless the court determines that an increase in the cost of living or a
20 special factor, such as the limited availability of qualified attorneys or agents,
21 justifies a higher fee.

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

23 **895.59 Liability exemption; disclosure of rule violations. (1)** In this
24 section:

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

ENGROSSED ASSEMBLY BILL 267

1 (b) “Small business” has the meaning given in s. 227.114 (1), but does not
2 include an entity, as defined in s. 48.685 (1) (b) or 50.065 (1) (c).

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

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

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

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

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

17 (a) The violation resulted in serious harm or endangerment to public health,
18 safety, or welfare.

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

21 (c) The small business that committed the violation has a pattern of continuous
22 or repeated violations of administrative rules.

23 **SECTION 18. Nonstatutory provisions.**

24 (1) Notwithstanding the length of terms specified for the representatives of
25 small businesses of the small business regulatory review board under section 15.155

ENGROSSED ASSEMBLY BILL 267

1 (5) of the statutes, as created by this act, 3 of the initial representatives of small
2 businesses shall be appointed for terms expiring on May 1, 2005, and the other 3
3 initial representatives of small businesses shall be appointed for terms expiring on
4 May 1, 2006.

5 **SECTION 19. Effective date.**

6 (1) This act takes effect on the first day of the 4th month beginning after
7 publication.

8 (END)