



## Fiscal Estimate Narratives

DOA 2/8/2018

LRB Number	17-4507/2	Introduction Number	AB-0880	Estimate Type	Original
<b>Description</b> deference by courts to agency interpretations of law, notice and comment requirements for guidance documents issued by agencies, and agency rule-making authority					

### Assumptions Used in Arriving at Fiscal Estimate

2017 Assembly Bill 880 (AB 880) would: prohibit a court from according deference to agency interpretations of law in certain proceedings and prohibit agencies from seeking deference in any proceeding to agency interpretations of law; establish various requirements with respect to the adoption and use of guidance documents by agencies, including requirements that agencies must comply with in order to adopt guidance documents; and provide that settlement agreements do not confer rule-making authority.

#### Agency Interpretations of Law

Generally, under current law, a court must accord due weight to the experience, technical competence, and specialized knowledge of the agency involved and the discretionary authority conferred upon it when reviewing an agency decision in a contested case or other matter subject to judicial review under the law governing administrative procedure for state agencies. Under the bill, a court performing judicial review of such a decision must accord no deference to an agency's interpretation of law and the agency may seek no deference in a proceeding based on the agency's interpretation of any law. The Department, based on the nature of its responsibilities, is not commonly party to a contested case or decision subject to judicial review under the law governing administrative procedure for state agencies. However, should the Department be party to the same, the fiscal effect of a court not according due weight to the experience, technical competence, and specialized knowledge of the agency, as well as discretionary authority conferred upon it, is indeterminate.

The Department's Division of Hearings and Appeals (DHA) conducts hearings under Chapter 227, Wis. Stats., for state agencies. The Department cannot predict how courts will treat decisions issued by the DHA nor the impact of the same on agency decisions. Accordingly, the fiscal effect of this provision of the bill on as it relates to DHA is also indeterminate.

#### Guidance Documents

Under current law, an agency may issue formal or official documents or communications, including manuals, handbooks, directives, or informational bulletins, that: explain the its implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the Department; or provides guidance or advice with respect to how the agency is likely to apply any statute or rule enforced or administered by the agency. Under the bill, the Department would be required to post the proposed guidance document on the agency's Internet site and submit it to the Legislative Reference Bureau (LRB) for publication in the register and to provide a period for persons to submit written comments to the agency on the proposed guidance document no less than 21 days before adopting the same, unless the Department obtains the approval of the Governor, in which case a comment period of less than 21 days could be used. Written comments received during the public comment period would be required to be retained and considered in determining whether to adopt the guidance document as originally proposed; modify the proposed guidance document, or take any other action.

The bill would also require each adopted guidance document, while valid, to: remain available on the Department's internet site and available for continuing public comment. It would also require the guidance document to be signed by the agency head (i.e., Secretary) below a certification that the guidance complies with § 227.10 and 227.11 of the Wisconsin Statutes, and that the guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule and that it contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes.

Additionally, the bill provides that any action or inaction by an agency related to the requirements of the bill

regarding guidance documents constitutes a decision subject to judicial review under the law governing administrative procedure for state agencies, and that on July 1, 2018, any guidance document that does not comply with the requirements of the bill would be rescinded.

The Department, in the course of carrying out its responsibilities, issues manuals, handbooks, directives, or informational bulletins and frequently asked questions that would be considered guidance documents under the bill. The nature of the development of some Department guidance documents would accommodate the posting and public comment period provided under the bill, while others primarily affecting other state agencies, such as State Controller's Office bulletins, are of a time sensitive nature and would require an exception of the Governor to post for a period of less than 21 days. The Department anticipates that, on an ongoing basis, it could provide for the workload associated with the activities required under the bill with existing resources. The Department also estimates that it could accommodate a likely one-time workload associated with the ensuring its existing guidance documents comply with the requirements of the bill prior to July 1, 2018.

#### Agency Rule-Making Authority; Settlement Agreements

Under the bill, it is explicitly provided that a settlement agreement, consent decree, or stipulated order of a court does not confer rule-making authority and cannot be used by an agency as authority to promulgate rules. The Department does not use settlement agreements, consent decrees, or stipulated orders of a court as authority to promulgate rules. Accordingly, there is no fiscal effect on the Department under this provision of the bill.

#### **Long-Range Fiscal Implications**