



WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

2017 Wisconsin Act 369 [2017 Senate Bill 884]	Various Changes to State Law
---	-------------------------------------

As described below, **2017 Wisconsin Act 369** modifies state law relating to the Department of Justice (DOJ), elections, gubernatorial appointments, legislative authority and functions, administrative rulemaking, agency operations and reporting, capitol security, guidance documents and other agency publications, the Wisconsin Economic Development Corporation (WEDC), and judicial deference to agency interpretations of law.

ELECTION LAW

Student ID Card as Voter ID

A voter must generally present “identification” when voting, a requirement commonly referred to as “Voter ID.” The statutes define “identification” as certain enumerated documents, including an unexpired identification card issued by a university or college in Wisconsin that is accredited, that contains the date of issuance and signature of the individual, and that contains an expiration date indicating that the card expires no later than two years after the date of issuance if the individual establishes that he or she is enrolled as a student on the date the card is presented.

The act amends the statutory definition of “identification” to include an identification card issued by a technical college in Wisconsin that meets the same requirements that apply to a card issued by a university or college.

State ID Card Petition Process

An individual may obtain a free Wisconsin identification card (“State ID card”) from the Department of Transportation (DOT) if the individual is a U.S. citizen who will be at least 18 years old on the date of the next election, and the individual requests that the State ID card be provided without charge for the purposes of voting. To obtain a State ID card, an individual must submit certain information, including proof of name, date of birth, identity, residency, and citizenship, legal permanent resident status, conditional resident status, or legal presence (“proof of citizenship”).

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature’s Web site at: <http://www.legis.wisconsin.gov>.

The act codifies a petition process previously contained in DOT administrative rules permitting an individual who does not possess otherwise required documentation to obtain a State ID card for voting by providing secondary documentation or through other verification, as well as the required issuance of an identification card receipt ("ID card receipt") to an individual whose petition is pending.

The act provides that an individual requesting a free State ID card for purposes of voting, who is unable to provide proof of name and date of birth or proof of citizenship, and to whom the documents are unavailable, may make a written petition to DOT for an exception to certain requirements. "Unavailable" means that the applicant does not have the document and would be required to pay a government agency to obtain it. Upon receiving a petition, DOT must provide the petitioner's birth information to the Department of Health Services or a federal agency to verify birth or the person's citizenship.

If DOT does not receive verification from a governmental agency within a specified period, DOT must contact the person and request additional information or secondary documentation. Secondary documentation may include a baptismal certificate; hospital birth certificate; delayed birth certificate; census record; early school record; family bible record; doctor's record of post-natal care; or other documentation deemed acceptable to DOT within its reasonable discretion. DOT must grant a petition if it concludes that it is more likely than not that the name, date of birth, and U.S. citizenship in the application are correct, on the basis of secondary documentation or other corroborating information.

DOT must issue an ID card receipt to an individual who applies for a free State ID card for voting purposes and makes a petition. The ID card receipt constitutes a temporary State ID card, is valid for a period of 60 days or less, and must be marked "FOR VOTING PURPOSES ONLY." DOT must issue the ID card receipt within a specified timeline, which varies depending upon whether a petition is made shortly before or after a statewide election. DOT must continue to issue new ID card receipts to a person prior to expiration of the prior receipt, until DOT denies the person's application, a receipt is returned as nondeliverable, or other specified circumstances arise.

The act also provides DOT with discretion to issue a State ID card in a different name than the name appearing on the individual's documents based on a common law name change. The provisions apply to issuance of a State ID card, regardless of whether the card is used for voting purposes.

In-Person Absentee Voting

Under prior law, in-person absentee voting was only permitted from the third Monday preceding the election until the Friday before the election. In addition, in-person absentee voting could only occur Monday to Friday from 8 a.m. to 7 p.m., and was prohibited on a legal holiday. Prior law also allowed the governing body of a municipality to designate one alternate in-person absentee voting site other than the office of the municipal clerk or board of election commissioners.¹

¹ The described time and date limitations and single alternate location for in-person absentee voting contained in prior law were not enforceable at the time this Act Memo was published, based on the decision of the federal court in *One Wisconsin Institute v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016).

The act changes the period of time during which in-person absentee voting is permitted. Under the act, in-person absentee voting may occur from 14 days preceding the election to the Sunday preceding the election, but cannot occur on a legal holiday. The act also eliminates the limits on hours of the day during which in-person absentee voting may occur, and allows the governing body of a municipality to designate more than one alternate site for in-person absentee voting.

Military and Overseas Voters

Prior law required all absentee voters, including military and overseas voters, to complete an absentee ballot certification before a witness who is an adult U.S. citizen. Prior law also provided that military voters and certain overseas voters could receive an absentee ballot by email or fax.

The act provides that an individual witnessing an absentee ballot for a military or overseas voter does not have to be a U.S. citizen, but must be 18 or older. The act also allows any overseas voter to request and receive an absentee ballot by email or fax, and creates a new definition for "overseas elector."

THE ATTORNEY GENERAL, DOJ, LEGAL REPRESENTATION, AND INTERVENTION

Legal Representation for the Legislature, Legislators, and Legislative Employees

DOJ provides legislators and legislative employees legal representation in most cases. The Assembly and Senate policy manuals and past practice also allow legislators and legislative employees to obtain legal counsel other than from DOJ ("outside legal counsel") to provide representation.

The act allows: (1) the Assembly speaker to authorize a representative or Assembly employee to obtain outside legal counsel; (2) the Senate majority leader to authorize a senator or Senate employee to obtain outside legal counsel; and (3) the co-chairs of the Joint Committee on Legislative Organization (JCLO) to authorize a legislative service agency employee to obtain outside legal counsel. The Assembly speaker, the Senate majority leader, and the JCLO co-chairs, respectively, must approve all financial costs and terms of representation. Under the act, outside legal counsel may be obtained if the acts or allegations underlying the action are arguably within the scope of the legislator's or legislative employee's duties.

The act also allows: (1) the Assembly speaker to obtain outside legal counsel in any action in which the Assembly is a party or in which the interests of the Assembly are affected, as determined by the speaker; (2) the Senate majority leader to obtain outside legal counsel in any action in which the Senate is a party or in which the interests of the Senate are affected, as determined by the majority leader; and (3) the JCLO co-chairs to obtain outside legal counsel in any action in which the Legislature is a party or in which the interests of the Legislature are affected, as determined by the co-chairs. The Assembly speaker, Senate majority leader, and the JCLO co-chairs, respectively, must approve all financial costs and terms of representation.

Statutory Challenges - the Attorney General

Prior statutes and case law require that if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general generally must be served with a copy of the proceeding and be entitled to be heard.

The act adds more types of statutory challenges in which the attorney general is required to be served and be entitled to be heard. Specifically, the act provides that “[i]f a statute, ordinance or franchise is alleged to be unconstitutional, or to be in violation of or preempted by federal law, or if the construction or validity of a statute is otherwise challenged,” the attorney general must be served with a copy of the proceeding and be entitled to be heard.

Statutory Challenges – the Legislature

Under **prior law**, in any proceeding under the state’s declaratory judgment act² in which the constitutionality, construction, or application of any provision of ch. 13, 20, 111, 227, or 230, subch. I, III, or IV of ch. 16, or s. 753.075, Stats., or of any statute allowing a legislative committee to suspend or to delay or prevent the adoption of a rule, is placed in issue, JCLO must be served with a copy of the petition and JCLO, the Senate Committee on Organization, or the Assembly Committee on Organization may intervene as a party to the proceedings and be heard.³

Instead, **the act** requires that the Assembly speaker, Senate president, and Senate majority leader be served with a copy of the proceeding in an action in which “a statute is alleged to be unconstitutional, or to be in violation of or preempted by federal law, or if the construction or validity of a statute is otherwise challenged.” In these actions, the Assembly, the Senate, and the Legislature are entitled to be heard.

The act also allows the Assembly, the Senate, and the Legislature to intervene⁴ at any time in certain actions as a matter of right. Under the act, the right to intervene arises when a party to an action in state or federal court challenges the constitutionality of a statute, facially or as applied; challenges a statute as violating or preempted by federal law; or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense. The Assembly Committee on Organization may intervene on behalf of the Assembly, the Senate Committee on Organization may intervene on behalf of the Senate, and JCLO may intervene on behalf of the Legislature. Each committee may obtain outside legal counsel. The power to intervene, as provided in the act, applies to any litigation pending in state or federal court on the act’s effective date.

Settlement Authority – Civil Actions Prosecuted by DOJ

Under **prior law**, DOJ could compromise or discontinue any civil action it prosecutes at the direction of the officer, department, board, or commission that directed the prosecution. Any civil action prosecuted by DOJ on the initiative of the attorney general, or at the request of any individual, could be compromised or discontinued with the approval of the governor.

Under **the act**, any civil action prosecuted by DOJ by the direction of any officer, department, board, or commission, on the attorney general’s own initiative, or at the request of any individual may only be compromised or discontinued with the approval of a legislative body. The compromise

² Very generally, the state’s declaratory judgment act grants courts the “power to declare rights, status, and other legal relations.” [s. 806.04 (1), Stats.]

³ Wisconsin law also requires that in instances where the constitutionality, construction, or application of certain statutes relating to administrative rules are placed in issue, a party must serve the Joint Committee for Review of Administrative Rules (JCRAR). With approval from JCLO, JCRAR may become a party and be entitled to be heard. [s. 806.04 (11), Stats.]

⁴ Intervention is a process used by a person seeking to participate in a case as a party, even though the person was not named as a party by those parties in the case.

or discontinuance may be approved by the Assembly, Senate, or Legislature, acting as an intervenor under the authority, described above, to intervene in certain actions where a statutory challenge is being made. If there is no intervenor, DOJ may submit a proposed plan to compromise or discontinue the prosecution to the Joint Committee on Finance (JCF) for the committee's approval. The compromise or discontinuance may occur only if JCF approves the proposed plan. The act prohibits DOJ from submitting a proposed plan to JCF if the plan concedes the unconstitutionality or other invalidity of a statute, facially or as applied, or concedes that a statute violates or is preempted by federal law, without JCLO approval.

Settlement Authority - Civil Actions Defended by DOJ

At the request of the head of any department, the attorney general may generally appear for and defend any department, officer, employee, or agent of the department in any matter brought before a court or an administrative agency for or on account of any act growing out of or committed in the lawful course of an officer's, employee's, or agent's duties. Under **prior law**, the attorney general could compromise and settle these actions as the attorney general determined to be in the best interest of the state.

The act creates an exception to the attorney general's power to compromise and settle actions that the attorney general is appearing for and defending. Under the act, if the action is for injunctive relief or there is a proposed consent decree, the attorney general may not compromise or settle the action without involving a legislative body. The act provides that the compromise or settlement may be approved by the Assembly, Senate, or Legislature, acting as an intervenor under the authority, described above, to intervene in certain actions where a statutory challenge is being made. If there is no intervenor, DOJ must submit a proposed plan to JCF for passive review. If the JCF co-chairs notify the attorney general within 14 working days after the plan is submitted to the committee that a meeting has been scheduled for the purpose of reviewing the proposed plan, the attorney general may compromise and settle the action only with JCF approval. The attorney general may not submit a proposed plan to JCF if the plan concedes the unconstitutionality or other invalidity of a statute, facially or as applied, or concedes that a statute violates or is preempted by federal law, without JCLO approval.

Use of Settlement Funds

Under **prior law**, the attorney general was required to submit to JCF for 14-day passive review a proposed plan for the expenditure of settlement funds that are not committed under the terms of the settlement.

The act requires the attorney general to deposit all settlement funds into the general fund. The act also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Office of the Solicitor General

The act eliminates the Office of the Solicitor General in DOJ. Effective January 1, 2019, the act eliminates four unclassified positions – the solicitor general and three deputy solicitor general positions – and decreases DOJ funding by \$320,000 for fiscal year 2018-19.

Gifts and Grants Appropriations

The act changes DOJ's gifts and grants appropriations for law enforcement and administrative service programs from continuing appropriations to annual, all monies received appropriations.

ADMINISTRATIVE RULEMAKING, GUIDANCE DOCUMENTS, AND AGENCY PUBLICATIONS

Guidance Documents

Prior to adoption of guidance documents, the act directs agencies to post the documents, as defined by the act, for public comment, and to certify the contents of such documents.⁵ The act also requires an agency to post each guidance document on its internet site and permit continued public comment on the document; specifies that guidance documents do not have the force of law; and directs the manner in which guidance documents may be used with respect to administrative and judicial proceedings.

Agency Publications

The act specifies that every agency publication, including guidance documents, must include citations to the provisions of the statutes or administrative code, or both, that support any statement or interpretation of law contained in the publication. This provision of the act applies to agency publications in print as well as on an agency's internet site, but does not apply to publications of the UW Board of Regents, the Technical College System, and ETF.

JCRAR Authority to Suspend Administrative Rules

Under s. 227.26, Stats., JCRAR may temporarily suspend all or part of an administrative rule previously promulgated by a state agency. Such temporary suspension may be made permanent via enactment of a bill in support of the suspension. Under prior law, if bills in support of suspension fail to be enacted, the suspension is lifted and JCRAR may not suspend the rule again.

The act permits JCRAR to suspend an administrative rule multiple times.

Limitations on Rulemaking Authority

The act specifies that a plan submitted to the federal government to comply with a federal law does not confer rulemaking authority and specifies that an agency may not agree to promulgate a rule as a component of a plan unless the agency has authority to promulgate the rule at the time the compliance plan is submitted. Similarly, the act specifies that a settlement agreement, consent decree, or court order does not confer rulemaking authority and specifies that an agency may not agree to promulgate a rule as a part of a settlement, consent decree, or court order unless the agency

⁵ The act defines "guidance document" to mean "any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin" that either explains the agency's implementation of a statute or rule or provides guidance or advice that is likely to apply to a class of persons similarly affected. Certain types of documents are expressly excluded from the definition, including, for example, most of the types of documents also excluded from the statutory definition of "rule," as well as guidance documents of the University of Wisconsin (UW) Board of Regents, the Technical College System, and the Department of Employee Trust Funds (ETF).

has authority to promulgate the rule at the time the agreement, consent decree, or court order is executed.

Advisory Committees

Under s. 227.13, Stats., an agency may appoint a committee of experts, interested persons, or representatives of the public to advise the agency with respect to contemplated rulemaking.

The act specifies that an agency must notify JCRAR of the membership of any committee appointed by the agency.

Deference

On June 26, 2018, the Wisconsin Supreme Court issued its decision in *Tetra Tech EC, Inc., and Lower Fox River Remediation LLC v. Wisconsin Department of Revenue*, 2018 WI 75. As part of its opinion, the court ended its practice of deferring to an agency's conclusions of law.

The act codifies a similar standard with respect to judicial review under ch. 227, Stats., and also specifies that an agency may not seek deference in any proceeding based on the agency's interpretation of any law.

WEDC

WEDC Board Composition

Under **prior law**, WEDC was governed by a board of 12 voting members. Six members were nominated by the governor and appointed by the Senate to serve at the pleasure of the governor. Three members were appointed by the Assembly speaker, including one majority and one minority party representative to the Assembly, and one person employed in the private sector, to serve at the speaker's pleasure. Three members were appointed by the Senate majority leader, including one majority and one minority party senator, and one person employed in the private sector, to serve at the majority leader's pleasure.

The act provides for two compositions of the WEDC board — one to be in effect from the date the act takes effect through September 1, 2019, and the second to take effect after September 1, 2019. Specifically, after September 1, 2019, the act provides for a 16 voting member board, consisting of six members nominated by the governor, four members appointed by the Assembly speaker, four members appointed by the Senate majority leader, one member appointed by the Assembly minority leader, and one member appointed by the Senate minority leader. Before September 1, 2019, the act authorizes the Assembly speaker and the Senate majority leader to each appoint one additional board member, resulting in a board with 18 voting members. The act provides for the expiration of current members' terms and staggered terms for new members appointed pursuant to the act.

Quorum Requirement for WEDC Board

Prior law specified that a majority of the 12 **voting** members of the WEDC board constitutes a quorum for the purpose of conducting the board's business and exercising its powers, notwithstanding the existence of any vacancies on the board.

The act modifies the quorum requirement to specify that a majority of the **appointed members currently serving** on the board constitutes a quorum for purposes of conducting the WEDC board's business and exercising its powers.

Appointment of WEDC Chief Executive Officer

Under **prior law**, WEDC's chief executive officer (CEO) was nominated by the governor and appointed by the Senate to serve at the pleasure of the governor.

The act, through September 1, 2019, the WEDC CEO is instead appointed by the WEDC board and serves at the pleasure of the board. The act reinstates prior law relating to the CEO's appointment after that date.

Appointment and Supervision of Foxconn Liaison

2017 Wisconsin Act 58, which implemented an agreement between WEDC and SIO Intl. Wisconsin, Inc., and AFE, Inc. ("the Wisconsin Foxconn companies"), created a liaison position for the Foxconn project. The position authority expires on December 31, 2022.

The act specifies that the WEDC board is responsible for appointing and supervising that position.

Designation of Enterprise Zones

The enterprise zone tax credit program provides refundable tax credits for certain activities, including the creation or retention of jobs, employee training, and significant capital expenditures, to eligible businesses located in enterprise zones. **Prior law** authorized WEDC to designate up to 30 enterprise zones at any given time, and did not require WEDC to obtain legislative approval prior to designating an enterprise zone.

The act removes the limit on the number of enterprise zones that may be in effect at any given time. In addition, the act makes the designation of new enterprise zones subject to 14-day passive review by JCF.

Verification of Information Submitted by Enterprise Zone Tax Credit Recipients

Prior law required recipients of WEDC grants and loans, but not tax credit recipients, to submit a report to WEDC at intervals specified in the recipient's contract with WEDC. Prior law also required the WEDC board to annually and independently verify the accuracy of the reported information by reviewing a sample of grants and loans. Separately, prior law required WEDC to annually verify information submitted to the Department of Revenue (DOR) by persons claiming economic development tax credits.

The act requires recipients of economic development tax credit programs, as well as grant and loan programs under current law, to submit reports to WEDC according to timeframes specified in contracts between the recipients and WEDC. The act also requires each recipient of a tax credit, grant, or loan to submit a statement attesting to the accuracy and truthfulness of the information submitted. Likewise, the act extends the WEDC board's duty to annually verify information from a sample of those reports to tax credit programs. However, the act removes the requirement under current law relating to WEDC verification of information submitted to DOR.

MISCELLANEOUS ADDITIONAL CHANGES

Senate Confirmation of Executive Appointments

The act specifies the impact of the Senate voting to reject an individual nominated by the governor or another state officer or agency to any office or position that requires the advice and

consent of the Senate. Under the act, such a nominee who has been rejected by the Senate may not hold the office or position, be nominated again for the office or position, or perform any duties of the office or position during the same legislative biennium.

Department of Veterans Affairs Fund Transfers From State Veterans Homes Revenue

The Department of Veterans Affairs (DVA) is authorized to transfer all or part of the unencumbered balance of certain appropriations for the operation of state veterans homes to the veterans trust fund or the veterans mortgage loan repayment fund.

The act requires DVA to notify JCF in writing of any fund transfers from the appropriations for the operation of state veterans homes to the veterans trust fund or the veterans mortgage loan repayment fund.

Department of Corrections Report on Pardons and Releases From Imprisonment

At the request of the Legislature, **the act** requires the Department of Corrections to submit a report to the Legislature and post the report to its website that provides information about individuals who have been pardoned or, in certain cases, have been released from imprisonment. Specifically, the report must include information about any individual who was pardoned for a crime or was released from a term of imprisonment without completing his or her sentence during the time range specified in the request or for the period since the previous report was submitted to the Legislature. This information includes the name of the individual, the pertinent crime, and the name of the person who authorized the action. The report must also include information about whether an individual who appears on the report has been convicted of a crime, the name of that individual, and the crime for which he or she was convicted.

Firearms in the Capitol

Under **prior law**, capitol security policies, including the ability to carry concealed firearms in public spaces in the capitol, were established by the Department of Administration (DOA).

The act generally requires passive review by JCLO of any proposed change by DOA to security at the capitol, including any proposed restriction on carrying a firearm into the capitol. However, the act provides an exception to that requirement in the case of a proposed change to security at the capitol that is necessary to prevent or mitigate a risk of imminent danger. If such a change is made by DOA pursuant to the exception, the JCLO co-chairs may review that action later.

Legislative Office Space

Generally, JCLO must assign office space for legislative offices and the offices of the legislative service agencies (Legislative Audit Bureau, Legislative Council, Legislative Fiscal Bureau, Legislative Reference Bureau, and Legislative Technology Services Bureau). **Prior law** required DOA to lease or acquire office space for legislative offices or legislative service agencies at the direction of JCLO.

The act requires the JCLO co-chairs, rather than DOA, to lease or acquire office space for legislative offices or legislative service agencies.

Municipal Flood Control and Riparian Restoration Program

Under **prior law**, retained by the act, the municipal flood control and riparian restoration program provides financial assistance for certain local storm water and groundwater projects.

Generally, the Department of Natural Resources (DNR) must promulgate rules specifying eligibility criteria for the program. However, a provision in the 2017 Biennial Budget Act required the DNR, during the 2017-19 fiscal biennium, to consider an applicant eligible for a grant under the program if the applicant's project is funded or executed in whole or part by the U.S. Army Corps of Engineers.

The act extends the eligibility requirement for U.S. Army Corps-funded or -executed projects to the 2019-21 fiscal biennium.

DOA Web Portal

The act requires DOA to submit an annual report to the Legislature and the JCF regarding the administration of an information technology and communication services self-funded web portal. The annual reports must include financial statements, a list of available services, certain fees and activity data, and any other information DOA determines is appropriate to include.

Effective date: December 16, 2018

Prepared by: Katie Bender-Olson, Anna Henning, and Michael Queensland, Senior Staff Attorneys; and Scott Grosz, Principal Attorney

December 17, 2018

KBO:AH:MQ:SG:mcm;ty