2017 ASSEMBLY BILL 880

January 29, 2018 - Introduced by Representatives JACQUE, SANFELIPPO, BRANDTJEN, HORLACHER, KATSMA, NEYLON, TITTL, WICHERGS, THIESFELDT, HUTTON and R. BROOKS, cosponsored by Senators CRAIG and STROEBEL. Referred to Joint Committee for Review of Administrative Rules.

AN ACT to amend 227.01 (13) (intro.), subchapter II (title) of chapter 227 [precedes 227.10], 227.11 (title), 227.53 (1) (intro.) and 227.57 (11); and to create 35.93 (2) (b) 3. im., 227.01 (3m), 227.10 (2g), 227.11 (3) and 227.112 of the statutes; relating to: deference by courts to agency interpretations of law, notice and comment requirements for guidance documents issued by agencies, and agency rule-making authority.

Analysis by the Legislative Reference Bureau

This bill 1) prohibits a court from according deference to agency interpretations of law in certain proceedings and prohibits agencies from seeking deference in any proceeding to agency interpretations of law; 2) establishes 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 3) provides that settlement agreements do not confer rule-making authority.

Agency interpretations of law

Generally under current law, 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, a court must accord due weight to the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The bill limits this directive
such that a court performing judicial review of such a decision must accord no
deferece to an agency's interpretation of law.

The bill also provides that no agency may seek deference in any proceeding
based on the agency's interpretation of any law.

**Guidance documents**

Subject to various exceptions, the bill defines “guidance document” as any
formal or official document or communication issued by an agency, including a
manual, handbook, directive, or informational bulletin, that 1) explains the agency's
implementation of a statute or rule enforced or administered by the agency, including
the current or proposed operating procedure of the agency; or 2) provides guidance
or advice with respect to how the agency is likely to apply any statute or rule enforced
or administered by the agency, if that guidance or advice is likely to apply to a class
of persons similarly affected.

The bill requires each agency, no less than 21 days before adopting a guidance
document, to post the proposed guidance document on the agency's Internet site and
submit it to the Legislative Reference Bureau for publication in the register and to
provide a period for persons to submit written comments to the agency on the
proposed guidance document. The agency must retain all written comments
submitted during the public comment period and consider those comments in
determining whether to adopt the guidance document as originally proposed, modify
the proposed guidance document, or take any other action. The bill allows for a
comment period of less than 21 days with the approval of the governor. The bill also
requires each adopted guidance document, while valid, to remain available on the
agency’s Internet site and requires the agency to permit continuing public comment
on the guidance document. Each guidance document must be signed by the head of
the agency below a statement containing certain certifications.

The bill provides that a guidance document does not have the force of law and
does not provide the authority for implementing or enforcing a standard,
requirement, or threshold, including as a term or condition of any license. An agency
that proposes to rely on a guidance document to the detriment of a person in any
proceeding must afford the person an adequate opportunity to contest the legality
or wisdom of a position taken in the guidance document, and an agency may not use
a guidance document to foreclose consideration of any issue raised in the guidance
document. The bill also contains other provisions with respect to agency use of and
reliance upon guidance documents, and allows certain persons to petition an agency
to promulgate a rule in place of a guidance document.

The bill also 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.

The bill provides that on July 1, 2018, any guidance document that does not
comply with the requirements in the bill is considered to be rescinded.

**Agency rule-making authority; settlement agreements**

The bill provides that a settlement agreement, consent decree, or court order
does not confer rule-making authority and cannot be used by an agency as authority
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to promulgate rules. The bill provides that no agency may agree to promulgate a rule as a term in any settlement agreement, consent decree, or stipulated order of a court unless the agency has explicit statutory authority to promulgate the rule at the time the settlement agreement, consent decree, or stipulated order of a court is executed.

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:

SECTION 1. 35.93 (2) (b) 3. im. of the statutes is created to read:

35.93 (2) (b) 3. im. Notices of public comment periods on proposed guidance documents under s. 227.112 (1) (a).

SECTION 2. 227.01 (3m) of the statutes is created to read:

227.01 (3m) (a) “Guidance document” means, except as provided in par. (b), any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that does any of the following:

1. Explains the agency’s implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency.

2. Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

(b) “Guidance document” does not include any of the following:

1. A rule that has been promulgated and that is currently in effect or a proposed rule that is in the process of being promulgated.
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2. A standard adopted, or a statement of policy or interpretation made, whether preliminary or final, in the decision of a contested case, in a private letter ruling under s. 73.035, or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts.

3. Any document or activity described in sub. (13) (a) to (zz), except that “guidance document” includes a pamphlet or other explanatory material described under sub. (13) (r) that otherwise satisfies the definition of “guidance document” under par. (a).

4. Any document that any statute specifically provides is not required to be promulgated as a rule.

5. A declaratory ruling issued under s. 227.41.

6. A pleading or brief filed in court by the state, an agency, or an agency official.

7. A letter or written legal advice of the department of justice or a formal or informal opinion of the attorney general, including an opinion issued under s. 165.015 (1).

8. Any document or communication for which a procedure for public input, other than that provided under s. 227.112 (1), is provided by law.

9. Any document or communication that is not subject to the right of inspection and copying under s. 19.35 (1).

SECTION 3. 227.01 (13) (intro.) of the statutes is amended to read:

227.01 (13) (intro.) “Rule” means a regulation, standard, statement of policy, or general order of general application which has the effect of law and is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. “Rule” includes a modification of a rule under s. 227.265.
“Rule” does not include, and s. 227.10 does not apply to, any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, which that:

Section 4. Subchapter II (title) of chapter 227 [precedes 227.10] of the statutes is amended to read:

CHAPTER 227

SUBCHAPTER II

ADMINISTRATIVE RULES AND GUIDANCE DOCUMENTS

Section 5. 227.10 (2g) of the statutes is created to read:

227.10 (2g) No agency may seek deference in any proceeding based on the agency’s interpretation of any law.

Section 6. 227.11 (title) of the statutes is amended to read:

227.11 (title) Extent to which chapter confers Agency rule-making authority.

Section 7. 227.11 (3) of the statutes is created to read:

227.11 (3) A settlement agreement, consent decree, or court order does not confer rule-making authority and cannot be used by an agency as authority to promulgate rules. No agency may agree to promulgate a rule as a term in any settlement agreement, consent decree, or stipulated order of a court unless the agency has explicit statutory authority to promulgate the rule at the time the settlement agreement, consent decree, or stipulated order of a court is executed.

Section 8. 227.112 of the statutes is created to read:

227.112 Guidance documents. (1) (a) Except as provided in par. (c), no less than 21 days before adopting a guidance document, an agency shall post the proposed
guidance document on the agency’s Internet site and, on the same date, submit a
notice of the public comment period on the proposed guidance document under par.
(b), including the Web address of the agency’s Internet site at which comments may
be submitted, to the legislative reference bureau, in a format approved by the
legislative reference bureau, for publication in the register. The notice need not be
published in the register on the same day the agency posts the proposed guidance
document on its Internet site.

(b) The agency shall provide for a period for public comment on a proposed
guidance document posted under par. (a), during which any person may submit
written comments to the agency with respect to the proposed guidance document.
Except as provided in par. (c), the period for public comment shall end no sooner than
the 21st day after the date on which the proposed guidance document is posted on
the agency’s Internet site.

(c) An agency may post a proposed guidance document less than 21 days before
adopting the proposed guidance document and with a public comment period shorter
than 21 days with the approval of the governor.

(d) An agency shall retain all written comments submitted during the public
comment period under par. (b) and shall consider those comments in determining
whether to adopt the guidance document as originally proposed, modify the proposed
guidance document, or take any other action.

(2) An agency shall post each guidance document that the agency has adopted
on the agency’s Internet site and shall permit continuing public comment on the
guidance document. The agency shall ensure that each guidance document that the
agency has adopted remains on the agency’s Internet site as provided in this
subsection until the guidance document is no longer in effect, is no longer valid, or
is superseded or until the agency otherwise rescinds its adoption of the guidance document.

(3) A guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any license. An agency that proposes to rely on a guidance document to the detriment of a person in any proceeding shall afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the guidance document. An agency may not use a guidance document to foreclose consideration of any issue raised in the guidance document.

(4) If an agency proposes to act in any proceeding at variance with a position expressed in a guidance document, it shall provide a reasonable explanation for the variance. If an affected person in any proceeding may have relied reasonably on the agency's position, the explanation must include a reasonable justification for the agency's conclusion that the need for the variance outweighs the affected person's reliance interest.

(5) Persons that qualify under s. 227.12 to petition an agency to promulgate a rule may, as provided in s. 227.12, petition an agency to promulgate a rule in place of a guidance document.

(6) Any action or inaction by an agency related to the requirements of this section constitutes a decision subject to judicial review under s. 227.53.

(7) Any guidance document shall be signed by the secretary or head of the agency below the following certification: “I have reviewed this guidance document or proposed guidance document and I certify that it complies with sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold
that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes."

(8) This section does not apply to guidance documents adopted before the effective date of this subsection .... [LRB inserts date], but on July 1, 2018, any guidance document that has not been adopted in accordance with sub. (1) or that does not contain the certification required under sub. (7) shall be considered rescinded.

SECTION 9. 227.53 (1) (intro.) of the statutes is amended to read:

227.53 (1) (intro.) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.112 or 227.52 shall be entitled to judicial review of the decision as provided in this chapter and subject to all of the following procedural requirements:

SECTION 10. 227.57 (11) of the statutes is amended to read:

227.57 (11) Upon review of an agency action or decision affecting a property owner’s use of the property owner’s property, the court shall accord no deference to the agency’s interpretation of law if the agency action or decision restricts the property owner’s free use of the property owner’s property.