



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-3287/1  
MED:emw

## 2017 SENATE BILL 322

June 23, 2017 - Introduced by Senators NASS, DARLING and KAPENGA, cosponsored by Representatives BALLWEG, ALLEN, BERNIER, R. BROOKS, EDMING, FELZKOWSKI, GANNON, HORLACHER, HUTTON, KATZMA, KITCHENS, KLEEFISCH, KNODL, KREMER, KUGLITSCH, KULP, LOUDENBECK, MURPHY, MURSAU, NERISON, NEYLON, OTT, PETRYK, QUINN, RIPP, RODRIGUEZ, ROHRKASTE, SKOWRONSKI, SNYDER, SPIROS, STEINEKE, SWEARINGEN, TAUCHEN, THIESFELDT, TITTL, VORPAGEL, VOS, WEATHERSTON, WICHGERS and ZIMMERMAN. Referred to Committee on Labor and Regulatory Reform.

1     **AN ACT** *to amend* 227.135 (2); and *to create* 13.92 (2) (jg), 35.93 (2) (b) 3. fm.,  
2           35.93 (2) (b) 3. gm., 227.138, 227.26 (4) and 227.29 of the statutes; **relating to:**  
3           review by state agencies of administrative rules and enactments; an expedited  
4           process for repealing rules an agency no longer has the authority to promulgate;  
5           retrospective economic impact analyses for rules; and reporting by the  
6           Legislative Reference Bureau on rules in need of revision.

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### *Analysis by the Legislative Reference Bureau*

#### CURRENT LAW

Current law sets forth the procedure for promulgating administrative rules. Generally, that procedure consists of the following steps:

1. The agency planning to promulgate the rule prepares a statement of the scope of the proposed rule, which must be approved by the governor and the agency head before any state employee or official may perform any activity in connection with the drafting of the proposed rule.
2. The agency drafts the proposed rule, together with an economic impact analysis, plain-language analysis, and fiscal estimate for the proposed rule, and submits those materials to the Legislative Council Staff for review.
3. Subject to certain exceptions, a public hearing is held on the proposed rule.
4. The final draft of the proposed rule is submitted to the governor for approval.

**SENATE BILL 322**

5. The final draft of the proposed rule, together with the economic impact analysis, plain-language analysis, and fiscal estimate for the proposed rule, are submitted to the legislature for review by one standing committee in each house and by the Joint Committee for Review of Administrative Rules (JCRAR).

6. The proposed rule is filed with the Legislative Reference Bureau (LRB) for publication in the Wisconsin Administrative Register, and, subject to certain exceptions, the rule becomes effective on the first day of the first month beginning after publication of the revised chapters of the Wisconsin Administrative Code (code).

**THE BILL*****Expedited procedure for repealing unauthorized rules***

This bill provides for an alternate, expedited procedure an agency can use to repeal a rule that the agency determines it no longer has the authority to promulgate because of the repeal or amendment of the law that previously authorized its promulgation (unauthorized rule). Under the bill, an agency, instead of using the procedure described above, may promulgate a rule that repeals an unauthorized rule using the following procedure:

1. The agency submits a petition with a proposed rule that repeals a rule the agency has determined is an unauthorized rule to the Legislative Council Staff for review, along with certain information and a statement that the agency is petitioning JCRAR to use the expedited procedure to repeal a rule the agency has determined to be an unauthorized rule.

2. The Legislative Council Staff reviews the petition and proposed rule and submits to JCRAR the petition and proposed rule with a written report that includes a statement of the Legislative Council Staff's determination of whether the proposed rule proposes to repeal an unauthorized rule.

3. Following receipt of the petition and proposed rule submitted by the Legislative Council Staff, JCRAR reviews the petition and proposed rule and may 1) approve the agency's petition if JCRAR determines that the proposed rule would repeal an unauthorized rule; 2) deny the petition; or 3) request that the agency make changes to the proposed rule and resubmit the petition and proposed rule as described above.

If JCRAR approves the petition, the agency must promulgate the proposed rule to repeal the unauthorized rule by filing a certified copy of the rule with the LRB, together with a copy of JCRAR's decision.

***Agency review of rules***

The bill requires each agency with any rules published in the code to biennially submit a report to JCRAR listing all of the following rules promulgated or otherwise administered by that agency:

1. Unauthorized rules.
2. Rules for which the authority to promulgate has been restricted.
3. Rules that are obsolete or that have been rendered unnecessary.
4. Rules that are duplicative of, superseded by, or in conflict with another rule, a state statute, a federal statute or regulation, or a court ruling.
5. Economically burdensome rules.

**SENATE BILL 322**

The report must also include 1) a description of the agency's actions, if any, to address each rule listed in the report and, if the agency has not taken any action to address a rule listed in the report, an explanation for not taking action; 2) a description of the status of each rule listed in the previous year's report not otherwise listed; and 3) if the agency determines that there are no such rules to list, a statement of that determination.

If an agency identifies an unauthorized rule in the report, the bill requires the agency to submit a petition to repeal the unauthorized rule, using the process described above, within 30 days after the report.

***Agency review of legislative enactments***

The bill requires agencies to review enactments of the legislature (acts) to determine whether any part of an act results in any of the following consequences:

1. Eliminates or restricts the agency's authority to promulgate any of the agency's rules.
2. Renders any of the agency's rules obsolete or unnecessary.
3. Renders, for any reason, any of the agency's rules not in conformity with or superseded by a state statute, including due to statutory numbering or terminology changes in the act.
4. Requires or otherwise necessitates rule making by the agency.

If an agency determines that any such consequence results from an act, within six months after the act's effective date, the agency must do one or more of the following, as applicable, to address any consequence identified by the agency:

1. Submit a statement of the scope of a proposed rule to address any such consequence to the governor, unless the act requires otherwise or unless the agency submits a notice to JCRAR explaining why it is unable to submit the statement of scope within that time period and an estimate of when the agency plans to submit the statement of scope.
2. Submit a petition to use the expedited procedure described above for repealing an unauthorized rule to the Legislative Council Staff.
3. Submit a request to the LRB for the LRB to use its revision authority to make certain changes to the code.

***Biennial report by Legislative Reference Bureau***

The bill requires the LRB to biennially report to JCRAR regarding rules in the code that the LRB has identified as possibly being in need of revision.

***Retrospective economic impact analyses for existing rules***

The bill allows JCRAR to direct an agency to prepare a retrospective economic impact analysis for any of an agency's rules that are published in the code. JCRAR may identify one or more specific chapters, sections, or other subunits in the code that are administered by the agency as the rules that are to be the subject of the analysis and may specify a deadline for the preparation of the analysis. An agency must include in a retrospective economic impact analysis a comparison of the actual economic effect of the rules to any economic impact analysis that analyzed the economic effect of the rules when they were proposed. The bill otherwise requires

**SENATE BILL 322**

an agency to prepare a retrospective economic impact analysis in a manner similar to that prescribed for an economic impact analysis for a proposed rule.

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

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

1           **SECTION 1.** 13.92 (2) (jg) of the statutes is created to read:

2           13.92 (2) (jg) Prior to the end of each even-numbered year, report to the joint  
3 committee for review of administrative rules regarding rules in the Wisconsin  
4 administrative code that the chief has identified as possibly being in need of revision.

5           **SECTION 2.** 35.93 (2) (b) 3. fm. of the statutes is created to read:

6           35.93 (2) (b) 3. fm. Retrospective economic impact analyses for rules under s.  
7 227.138.

8           **SECTION 3.** 35.93 (2) (b) 3. gm. of the statutes is created to read:

9           35.93 (2) (b) 3. gm. Petitions and proposed rules submitted under s. 227.26 (4)  
10 (b) 1.

11           **SECTION 4.** 227.135 (2) of the statutes is amended to read:

12           227.135 (2) An agency that has prepared a statement of the scope of the  
13 proposed rule shall present the statement to the governor and to the individual or  
14 body with policy-making powers over the subject matter of the proposed rule for  
15 approval. The agency may not send the statement to the legislative reference bureau  
16 for publication under sub. (3) until the governor issues a written notice of approval  
17 of the statement. The individual or body with policy-making powers may not  
18 approve the statement until at least 10 days after publication of the statement under  
19 sub. (3). No state employee or official may perform any activity in connection with

**SENATE BILL 322**

1 the drafting of a proposed rule, except for an activity necessary to prepare the  
2 statement of the scope of the proposed rule until the governor and the individual or  
3 body with policy-making powers over the subject matter of the proposed rule  
4 approve the statement. This subsection does not prohibit an agency from performing  
5 an activity necessary to prepare a petition and proposed rule for submission under  
6 s. 227.26 (4).

7 **SECTION 5.** 227.138 of the statutes is created to read:

8 **227.138 Retrospective economic impact analyses for rules.** (1) The joint  
9 committee for review of administrative rules may direct an agency to prepare a  
10 retrospective economic impact analysis for any of an agency's rules that are  
11 published in the code. The committee may identify one or more specific chapters,  
12 sections, or other subunits in the code that are administered by the agency as the  
13 rules that are to be the subject of the analysis and may specify a deadline for the  
14 preparation of the analysis. A retrospective economic impact analysis shall contain  
15 information on the economic effect of the rules on specific businesses, business  
16 sectors, public utility ratepayers, local governmental units, and the state's economy  
17 as a whole. When preparing the analysis, the agency shall solicit information and  
18 advice from businesses, associations representing businesses, local governmental  
19 units, and individuals that have been affected by the rules. The agency shall prepare  
20 the retrospective economic impact analysis in coordination with local governmental  
21 units that have been affected by the rules. The agency may request information that  
22 is reasonably necessary for the preparation of a retrospective economic impact  
23 analysis from other businesses, associations, local governmental units, and  
24 individuals and from other agencies. The retrospective economic impact analysis  
25 shall include all of the following:

**SENATE BILL 322****SECTION 5**

1           (a) An analysis and quantification of the policy problem that the rules were  
2 intended to address, including comparisons with the approaches used by the federal  
3 government and by Illinois, Iowa, Michigan, and Minnesota to address that policy  
4 problem.

5           (b) An analysis and detailed quantification of the economic impact of the rules,  
6 including the implementation and compliance costs that have been incurred by or  
7 passed along to the businesses, local governmental units, and individuals that have  
8 been affected by the rules.

9           (c) An analysis of the actual and quantifiable benefits of the rules, including  
10 an assessment of how effective the rules have been in addressing the policy problem  
11 that the rules were intended to address.

12           (d) An analysis of alternatives to the rules, including the alternative of  
13 repealing the rules.

14           (e) A determination made in consultation with the businesses, local  
15 governmental units, and individuals that have been affected by the rules as to  
16 whether the rules have adversely affected in a material way the economy, a sector  
17 of the economy, productivity, jobs, or the overall economic competitiveness of this  
18 state.

19           (f) An analysis of the ways in which and the extent to which the rules have  
20 placed limitations on the free use of private property, including a discussion of  
21 alternatives to the rules that would minimize any such limitations.

22           (g) A comparison of the actual economic effect of the rules being analyzed to any  
23 economic impact analysis that analyzed the expected economic effect of those rules  
24 when they were proposed.

**SENATE BILL 322**

1 (h) Any other information requested by the committee related to the economic  
2 impact of the rules.

3 (2) An agency that prepares a retrospective economic impact analysis under  
4 sub. (1) shall submit that analysis to the department of administration, to the  
5 governor, and to the chief clerks of each house of the legislature, who shall distribute  
6 the analysis to the presiding officers of their respective houses, to the chairpersons  
7 of the appropriate standing committees of their respective houses, as designated by  
8 those presiding officers, and to the cochairpersons of the joint committee for review  
9 of administrative rules. The agency shall also send an electronic copy of the analysis  
10 to the legislative reference bureau, in a format approved by the legislative reference  
11 bureau, for publication in the register.

12 **SECTION 6.** 227.26 (4) of the statutes is created to read:

13 227.26 (4) REPEAL OF UNAUTHORIZED RULES. (a) In this subsection,  
14 “unauthorized rule” means a rule that an agency lacks the authority to promulgate  
15 due to the repeal or amendment of the law that previously authorized its  
16 promulgation.

17 (b) Notwithstanding ss. 227.114 to 227.117 and 227.135 to 227.19, an agency  
18 that promulgated or that otherwise administers a rule that the agency determines  
19 is an unauthorized rule shall petition the joint committee for review of  
20 administrative rules for authorization to repeal that rule by using the following  
21 process:

22 1. The agency shall submit a petition with a proposed rule that repeals the rule  
23 the agency has determined is an unauthorized rule to the legislative council staff for  
24 review. The proposed rule shall be in the form required under s. 227.14 (1) and shall  
25 include the material required under s. 227.14 (2) (a) 1., 2., and 7. and a statement that

**SENATE BILL 322****SECTION 6**

1 the agency is petitioning the joint committee for review of administrative rules to use  
2 the process under this subsection to repeal a rule the agency has determined to be  
3 an unauthorized rule. The agency shall also send an electronic copy of the petition  
4 and the proposed rule to the legislative reference bureau, in a format approved by  
5 the legislative reference bureau, for publication in the register.

6 2. The legislative council staff shall review the petition and proposed rule in  
7 accordance with s. 227.15 (2) and submit to the joint committee for review of  
8 administrative rules the petition and proposed rule with a written report including  
9 a statement of its determination as to whether the proposed rule proposes to repeal  
10 an unauthorized rule. The legislative council staff shall send the agency a copy of  
11 its report with an indication of the date on which the petition and proposed rule were  
12 submitted to the committee.

13 3. Following receipt of the petition and proposed rule submitted by the  
14 legislative council staff under subd. 2., the joint committee for review of  
15 administrative rules shall review the petition and proposed rule and may do any of  
16 the following:

17 a. Approve the agency's petition if the committee determines that the proposed  
18 rule would repeal an unauthorized rule.

19 b. Deny the agency's petition.

20 c. Request that the agency make changes to the proposed rule and resubmit the  
21 petition and proposed rule under subd. 1.

22 4. The committee shall inform the agency in writing of its decision as to the  
23 petition.

24 (c) If the joint committee for review of administrative rules approves a petition  
25 to repeal an unauthorized rule as provided in par. (b) 3. a., the agency shall



**SENATE BILL 322**

1 promulgate the proposed rule by filing a certified copy of the rule with the legislative  
2 reference bureau under s. 227.20, together with a copy of the committee's decision.

3 **SECTION 7.** 227.29 of the statutes is created to read:

4 **227.29 Agency review of rules and enactments. (1)** By March 31 of each  
5 odd-numbered year, each agency with any rules published in the code shall submit  
6 a report to the joint committee for review of administrative rules listing all of the  
7 following rules promulgated or otherwise administered by that agency:

8 (a) Unauthorized rules, as defined in s. 227.26 (4) (a), together with a  
9 description of the legislation that eliminated the agency's authority to promulgate  
10 any such rule.

11 (b) Rules for which the authority to promulgate has been restricted, together  
12 with a description of the legislation that restricted that authority.

13 (c) Rules that are obsolete or that have been rendered unnecessary, together  
14 with a description of why those rules are obsolete or have been rendered unnecessary.

15 (d) Rules that are duplicative of, superseded by, or in conflict with another rule,  
16 a state statute, a federal statute or regulation, or a ruling of a court of competent  
17 jurisdiction, together with a citation to or the text of any such statute, regulation, or  
18 ruling.

19 (e) Rules that the agency determines are economically burdensome.

20 **(2)** The report under sub. (1) shall also include all of the following:

21 (a) A description of the agency's actions, if any, to address each rule listed in  
22 the report. If the agency has not taken any action to address a rule listed in the  
23 report, the agency shall include an explanation for not taking action.

24 (b) A description of the status of each rule listed in the previous year's report  
25 not otherwise listed.

**SENATE BILL 322****SECTION 7**

1 (c) If the agency determines that there is no rule as described under sub. (1) (a),  
2 (b), (c), (d), or (e), a statement of that determination.

3 **(3)** If an agency identifies an unauthorized rule under sub. (1) (a) and is not  
4 otherwise in the process of promulgating a rule that repeals the unauthorized rule,  
5 the agency shall, within 30 days after the agency submits the report, submit a  
6 petition to the legislative council staff under s. 227.26 (4) (b) 1. to repeal the  
7 unauthorized rule if the agency has not previously done so.

8 **(4)** (a) In this subsection, “enactment” means an act or a portion of an act that  
9 is required to be published under s. 35.095 (3) (a).

10 (b) Each agency shall review enactments to determine whether any part of an  
11 enactment does any of the following:

12 1. Eliminates or restricts the agency’s authority to promulgate any rules  
13 promulgated or otherwise administered by that agency.

14 2. Renders any rules promulgated or otherwise administered by that agency  
15 obsolete or unnecessary.

16 3. Renders, for any reason, any rules promulgated or otherwise administered  
17 by that agency not in conformity with or superseded by a state statute, including due  
18 to statutory numbering or terminology changes in the enactment.

19 4. Requires or otherwise necessitates rule making by the agency.

20 (c) If an agency determines that any consequence specified in par. (b) 1. to 4.  
21 results from an enactment or part of an enactment, within 6 months after the  
22 applicable effective date for the enactment or part of the enactment, the agency shall  
23 do one or more of the following, as applicable, to address the consequence identified  
24 by the agency and notify the joint committee for review of administrative rules of its  
25 action:

