

Clearinghouse Rule 11-027

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF RULE-MAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : DEPARTMENT OF REGULATION
DEPARTMENT OF REULGAITON : AND LICENSING ADOPTING RULES
AND LICENSING : (CLEARINGHOUSE RULE 11-)

PROPOSED ORDER

The Wisconsin Department of Regulation and Licensing proposes an order to renumber and amend s. RL 4.08 (intro), and to create RL 4.08 (2), relating to background checks and fingerprinting.

Analysis prepared by the Department of Regulation and Licensing.

ANALYSIS

Statutes interpreted:

Sections 440.03 (13) (a), (b) and (c), and 448.05 (1) (a), Stats.

Statutory authority:

Sections 15.08 (5) (b), 227.11 (2) (a), 440.03 (1), 448.40 (1), Stats.

Explanation of agency authority:

Section 448.05, Stats., is enforced and administered by the Department of Regulation and Licensing (“DRL”) and the Medical Examining Board. Specifically, s. 448.40 (1), Stats., authorizes the Medical Examining Board to promulgate rules to carry out the purposes of the Medical Examining Board subchapter. Section 448.05 (1), Stats., is in the Medical Examining Board subchapter.

Further, the Medical Examining Board is obligated under s. 15.08 (5) (b), Stats., to promulgate rules for its own guidance and for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession.

DRL is a department in the state government, and is therefore an “agency” under s. 227.01 (1), Stats., Under s. 227.11(2) (a), Stats., it may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute. Both ss. 440.03 (13) and 448.05 (1), Stats., are enforced and administered by DRL.

Last, DRL is authorized under s. 440.03 (1), Stats., to promulgate rules defining uniform procedures to be used by the department, the attached boards, the examining boards, and the affiliated credentialing boards.

Related statute or rule:

Section 440.03 (7) Stats., and Wis. Admin. Code § RL 4.07 (52)

Plain language analysis:

Subject to ss. 111.321, 111.322 and 111.355, Stats., s. 448.05 (1) (a), Stats., requires that an applicant must not have an arrest or conviction record to be qualified for the grant of any license by the Medical Examining Board. Section 448.03 (13) (a), Stats., authorizes DRL to conduct investigations to determine whether applicants have arrest or conviction records and require applicants to provide any information that is necessary for the investigation. Under s. 448.03 (13) (b), Stats., DRL may investigate whether applicants to practice medicine and surgery have arrest or conviction records pursuant to rules it promulgates.

DRL promulgated Wis. Admin. Code chs. RL 4.07 and RL 4.08 to interpret s. 448.03 (13), Stats. Under chs. RL 4.07 and RL 4.08, DRL may require an applicant for physician licensure to submit fingerprints and undergo a criminal background check if “there exists reason to believe that the applicant has failed to accurately describe his or her conviction record.”

The addition to Section 1 creates a class of licensed credentials the applicants for which may be required to be photographed, submit fingerprints, and undergo criminal background checks in situations when there is not a reason to believe that an applicant has failed to accurately describe his or her conviction record.

Section 2 defines the class of licensed credentials created by the changes to Section 1. Section 2 requires applicants for a physician license to practice medicine and surgery to submit a full set of fingerprints along with their application for licensure. The fingerprints will be used to verify the applicant’s identity and conduct searches for criminal arrests and convictions in accordance with s. 440.03 (13), Stats.

Summary of, and comparison with, existing or proposed federal legislation:

The FBI will conduct background checks pursuant to federal law or a state law approved by the U.S. Attorney General under Public Law 92-544 (1972). DRL contacted the Crime Information Bureau of the Wisconsin Department of Justice to determine whether s. 440.03 (13), Stats., is an approved statute to authorize DRL to require background checks of applicants to practice medicine and surgery. On January 7, 2011, Phillip Collins, Deputy Director of the Crime Information Bureau confirmed that that the FBI

approves s. 440.03 (13), Stats., as a statute authorizing DRL to require background checks of applicants to practice medicine and surgery.

Comparison with rules in adjacent states:

Illinois: Illinois statute requires applicants for medical licensure to provide fingerprints for a criminal background check. 225 ILCS 60/9.7. The statute further requires the Illinois Department of Professional Regulation to promulgate rules to implement the requirement. *Id.* However, a review of Illinois' application and online instructions indicates that Illinois currently does not require applicants to submit fingerprints or undergo background checks. *See* <http://www.idfpr.com/dpr/WHO/med.asp>, accessed on Jan. 3, 2011.

Iowa: Iowa administrative rules require applicants for medical licensure to pay for and provide a full set of fingerprints for state and federal criminal background checks. IAC 653-9.4(2)p., 9.5(3)p., 9.6(2)j. and 8.4(7). Iowa promulgated the administrative rules based on the federal Volunteers for Children Act, Public Law 105-251 (1998). The U.S. Attorney General already approved the Volunteers for Children Act as a basis to enable "qualified entities" to require employees and volunteers to submit fingerprints for non-law enforcement criminal background checks.

Michigan: Michigan statute requires applicants for medical licensure to provide fingerprints for state and federal criminal background checks. MCL 333.16174(3).

Minnesota: Minnesota currently does not require applicants for medical licensure to undergo criminal background checks.

Summary of factual data and analytical methodologies:

In February 2010, DRL was awarded an American Recovery and Reinvestment Act grant to lead a group of nine states to reduce barriers to the portability of physician licenses. Since the award, Wisconsin has worked with Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri and South Dakota to develop best practices to improve the licensing process of physicians. In November, the states identified requiring applicants to submit fingerprints and undergo criminal background as a best practice. The requirement conforms to longstanding recommendations by the Federation of State Medical Boards ("FSMB").

Since April 2001, FSMB has affirmed its position that it is a best practice for state medical boards to "conduct criminal background checks as part of the licensure application process. *See* Federation of State Medical Boards, *Public Policy Compendium*, April 2010. The FSMB reaffirmed its position in April 2010. *Id.*

Further, as of September 2010, 35 out of 68 U.S. medical and osteopathic boards require applicants to submit fingerprints and undergo criminal background checks as part of the

application process. FSMB, *Criminal Background Checks Overview by State*, Last Updated September 6, 2010, at http://www.fsmb.org/pdf/GRPOL_Criminal_Background_Checks.pdf.

Analysis and supporting documents used to determine effect on small business or in preparation of economic report:

Section 227.137, Stats., requires an “agency” to prepare an economic impact report before submitting the proposed rule-making order to the Wisconsin Legislative Council. The Department of Regulation and Licensing is not included as an “agency” in this section.

Anticipated costs incurred by the private sector:

Every person seeking initial licensure to practice medicine and surgery in Wisconsin will incur the cost of conducting the criminal background check. The cost to the applicant of conducting a criminal background check is approximately \$56.25. The cost is the price the department charges applicants for the professions that it currently requires undergoing the same criminal background check process.

Fiscal estimate:

The department estimates that the proposed rule will have no significant fiscal impact.

Effect on small business:

These proposed rules will be reviewed by the department’s Small Business Review Advisory Committee to determine whether the rules will have any significant economic impact on a substantial number of small businesses, as defined in s. 227.114 (1), Stats. The Department’s Regulatory Review Coordinator may be contacted by email at john.murray@wisconsin.gov, or by calling (608) 266-8608.

Agency contact person:

Shawn Leatherwood, Paralegal, Department of Regulation and Licensing, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708; telephone 608-261-4438; email at Shancethea.Leatherwood@wisconsin.gov.

Place where comments are to be submitted and deadline for submission:

Comments may be submitted to Shawn Leatherwood, Paralegal, Department of Regulation and Licensing, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708-8935, or by email to Shancethea.Leatherwood@wisconsin.gov. Comments must be received on or before _____, to be included in the record of rule-making proceedings.

TEXT OF RULE

SECTION 1. RL 4.08 (intro) is renumbered and amended to read:

RL 4.08 Photographs and fingerprints. (1) The department may require an applicant for any of the credentials set forth in s. RL 4.07 and not listed in sub. (2) to be photographed and fingerprinted as a part of the credentialing process, if there exists reason to believe that the applicant has failed to accurately describe his or her conviction record. The department may refer photographs and fingerprints so obtained to the department of justice for internal analysis or submission to the federal bureau of investigation for the purpose of verifying the identity of the persons fingerprinted and obtaining records of their criminal arrests and convictions.

SECTION 2. RL 4.08 (2) is created to read:

The department shall require an applicant for a physician license under s. 448.02 to be fingerprinted on 2 fingerprint cards, each bearing a complete set of the person's fingerprints. The department of justice may submit the fingerprint cards to the federal bureau of investigation for the purpose of verifying the identity of the persons fingerprinted and obtaining records of their criminal arrests and convictions. The department shall charge an applicant any fees, costs, or other expenses incurred in conducting any investigation under this rule.

(END OF TEXT OF RULE)

The rules adopted in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register, pursuant to s. 227.22 (2) (intro.), Stats.

Dated _____ Agency _____

Ch. RL 4 CR 11- (Background Check)