

State of Wisconsin Department of Justice

Statement of Scope of Proposed Rules

Rule No.: Wis. Admin. Code JUS §§ Jus 17.03(8), 17.04(1)(c), 17.08(4), 17.12(2), and Wis. Admin. Code JUS ch. 18.

Relating to: Licenses authorizing persons to carry concealed weapons and concealed carry certification cards for qualified former federal law enforcement officers and former out-of-state law enforcement officers who reside in Wisconsin.

1. Description of the objectives of the rules:

The State of Wisconsin Department of Justice (“DOJ”) proposes to update four provisions in Wis. Admin. Code JUS ch. 17 that currently do not conform to statutory requirements. The provisions relate to firearms training courses for obtaining a concealed carry license; issuance of concealed carry licenses to members of the military stationed in Wisconsin; renewal of concealed carry licenses; and the background check fee for concealed carry licensing. The revision of these provisions will not materially alter their scope.

DOJ also proposes to update Wis. Admin. Code JUS ch. 18 to reflect statutory provisions authorizing DOJ to issue firearms certification cards to former out-of-state law enforcement officers who reside in Wisconsin. The revision of this chapter will increase its scope by adding a new category of persons authorized to receive firearms certification cards.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

In 2011 Wisconsin Act 35, the State of Wisconsin established a system under which DOJ is required to issue licenses authorizing eligible Wisconsin residents to carry concealed weapons in Wisconsin and to certify firearms safety and training instructors. The legislation also authorized DOJ to issue concealed carry certification cards to qualified former federal law enforcement officers who reside in Wisconsin. DOJ currently administers the licensing and certification card programs under administrative rules promulgated in 2013. *See* Wis. Admin. Code JUS chs. 17 and 18. Since those rules were promulgated, several relevant statutory provisions have been amended. The rules now need to be updated to reflect the current statutes.

A. JUS 17.03(8)

The statutory eligibility requirements for a concealed carry license include a requirement that the applicant provide proof of firearms training or equivalent firearms experience in any of a number of statutorily enumerated forms. *See* Wis. Stat. § 175.60(3)(g), (4)(a), and (7)(e). Several of the enumerated categories use the phrase “firearms safety or training course.” *See* Wis. Stat. § 175.60(4)(a)1.b. to e., Stats. The statute does not, however, define the meaning of that phrase.

DOJ’s current administrative rules include a definition of “firearms safety or training course” which provides, in pertinent part, that such a course must be “instructor-led.” JUS 17.03(7). The rules also include a definition of the term “instructor-led” which provides, in pertinent part, that an instructor-led course must have “an instructor-student ratio that does not exceed 50 students per instructor.” JUS 17.03(8). Read

together, those definitions require that a “firearms safety or training course” for concealed carry licensing purposes under Wis. Stat. § 175.60(4)(a)1.b. to e. must have a student-teacher ratio less than or equal to 50:1.

Under Wis. Stat. § 227.10(2m), “[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with [subchapter II of Wis. Stat. ch. 227.]” Under Wis. Stat. § 227.11(2)(a)3., “[a] statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.” In addition, Wis. Stat. § 175.60(2)(b), Stats., prohibits DOJ from imposing conditions, limitations, or requirements on the issuance of a concealed carry license that are not specifically provided for in Wis. Stat. § 175.60.

The legality of the 50:1 instructor-student ratio requirement was previously challenged in litigation. In the course of that litigation, DOJ determined that the requirement was not statutorily authorized. DOJ agreed to stop enforcing that requirement and the litigation was settled. Since that time, however, JUS 17.03(8) has not been amended to remove the 50:1 requirement.

The present proposal will amend JUS 17.03(8) to remove the requirement that a “firearms safety or training course,” as defined and used in JUS ch. 17, must have a student-teacher ratio less than or equal to 50:1. This change is needed in order to make the rule consistent with statutory requirements and with DOJ’s existing practice, and to make it clear to the public that the 50:1 requirement is no longer being enforced. The alternative would leave in the Administrative Code a requirement that DOJ has found to be statutorily unauthorized and that it is no longer enforcing.

B. JUS 17.04(1)(c)

As enacted in 2011, the concealed carry statute provided that only Wisconsin residents were eligible for a Wisconsin concealed carry license. Wis. Stat. § 175.60(3)(f) (2011). In accordance with that provision, DOJ promulgated JUS 17.04(1)(c), which requires DOJ to deny a concealed carry license application if it determines that the applicant is not a Wisconsin resident.

Section 175.60(3)(f) was later amended by 2015 Wisconsin Act 67. As amended, the statute allows a Wisconsin concealed carry license to be issued either to a Wisconsin resident or to a “military resident.” Wis. Stat. § 175.60(3)(f)1.–2. (2021). The phrase “military resident” is statutorily defined as “an individual who is in active service in the U.S. armed forces and is stationed in this state for a term that is scheduled to be at least one year in duration.” Wis. Stat. § 175.60(1)(dm) (2021).

The above change to Wis. Stat. § 175.60(3)(f) superseded the residency restriction in JUS 17.04(1)(c), and since that time, DOJ has issued licenses in accordance with the revised statute. DOJ now proposes to amend JUS 17.04(1)(c) to reflect the fact that a Wisconsin concealed carry license may be issued either to a Wisconsin resident or to a member of the military who is not otherwise a Wisconsin resident, but who is stationed in Wisconsin for at least one year. This change is needed in order to make JUS 17.04 consistent with Wis. Stat. § 175.60(3)(f)1.–2. (2021). The alternative would leave in the Administrative Code a residency restriction that is statutorily unauthorized and no longer enforced.

C. JUS 17.08(4)

As enacted in 2011, the concealed carry statute provided that a concealed carry license (other than an emergency license), unless revoked or suspended, was valid for a period of five years from the date on which the license was issued. Wis. Stat. § 175.60(15)(a) (2011). This applied to both a newly issued license and a renewal of a previously issued license. In accordance with that provision, DOJ promulgated JUS 17.08(4), which provides that “[u]nless revoked or suspended, any license other than an emergency license is valid for five years from the date of issuance by the department.”

Section 175.60(15)(a) was later amended by 2017 Wisconsin Act 5. As amended, the statute provides that, if a person renews a concealed carry license before its expiration date, the renewed license is valid for five years from the expiration date of the previous license, rather than five years from the date on which the renewed license was issued. *See* Wis. Stat. § 175.60(15)(a)1.–2. (2021).

The above change in the statutory method for calculating the expiration date of a renewed concealed carry license superseded the method under JUS 17.08(4), and since that time, DOJ has calculated the expiration date of a renewed license in accordance with the revised statute. DOJ now proposes to amend JUS 17.08(4) to reflect the current statutory method for calculating the expiration date of a renewed license. This change is needed in order to make JUS 17.08(4) consistent with Wis. Stat. § 175.60(15)(a)1.–2. (2021). The alternative would leave in the Administrative Code a provision that is statutorily unauthorized and no longer enforced.

D. JUS 17.12(2)

Under Wis. Stat. § 175.60(7)(d), an applicant for a concealed carry license is required to pay a background check fee that is equal to the fee charged under Wis. Stat. § 175.35(2i). When the concealed carry licensing program began in 2011, that fee amount was \$13. *See* Wis. Stat. § 175.35(2i) (2011). That \$13 fee was incorporated in DOJ’s administrative rules at JUS 17.12(2).

The \$13 fee amount was later superseded by 2013 Wis. Act 20, § 1970q, which amended Wis. Stat. § 175.35(2i) to reduce the applicable statutory fee from \$13 to \$10. Since that time DOJ has charged the statutory \$10 fee. DOJ now proposes to amend JUS 17.12(2) to conform to the fee amount set under Wis. Stat. § 175.35(2i). The alternative would leave in the Administrative Code a fee amount that is statutorily unauthorized and no longer enforced.

E. JUS Chapter 18

Under Wis. Stat. § 175.49(3), DOJ is authorized to issue concealed carry certification cards to former law enforcement officers who reside in Wisconsin. Subject to certain criteria and conditions, a former officer carrying such a card may lawfully carry a concealed weapon in this state. *See* Wis. Stat. § 941.23.

As enacted in 2011, Wis. Stat. § 175.49(3) authorized DOJ to issue concealed carry certification cards to former federal law enforcement officers who reside in Wisconsin. *See* Wis. Stat. § 175.49(3) (2011). DOJ subsequently promulgated JUS ch. 18, which governs the procedures and standards for issuing such cards.

Section 175.49(3) was later amended by 2015 Wisconsin Act 68. As amended, the statute authorizes DOJ to issue concealed carry certification cards not only to former federal officers who reside in Wisconsin, but also to former officers who previously worked for a state or local law enforcement agency in another state and who now reside in Wisconsin. *See* Wis. Stat. § 175.49(1)(em) and (3)(a) (2021).

DOJ now proposes to amend JUS ch. 18 to reflect the above statutory change. This proposal is needed to make JUS ch. 18 consistent with Wis. Stat. § 175.49 (2021), and to adapt the procedures and standards for issuing concealed carry certification cards to accommodate both former federal officers who reside in Wisconsin and former non-federal law officers from other states who now reside in Wisconsin.

3. Statutory authority for the rule (including the statutory citation and language):

The proposed changes to JUS chs. 17 and 18 are authorized by Wis. Stat. § 227.11(2)(a), which provides:

(2) Rule-making authority is expressly conferred as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

This statute expressly confers on DOJ the general power to determine whether administrative rules interpreting the provisions in Wis. Stat. § 175.60 that are to be enforced or administered by DOJ are necessary to effectuate the purpose of those statutory provisions and, if such necessity is found, to promulgate such administrative rules, as long as those rules do not exceed the bounds of correct interpretation of the governing statutes.

DOJ finds that the proposed changes to JUS §§ 17.03(8), 17.04(1)(c), 17.08(4), and 17.12(2), and to JUS ch. 18 are necessary to bring those rules into conformity with the current version of the governing statutes, as described in the preceding sections of this statement.

DOJ further finds that the rules here proposed:

- do not exceed the bounds of correct interpretation of Wis. Stat. §§ 175.49 or 175.60;
- are authorized by the statutes described above and are not based on authority derived from any other statutory or nonstatutory statements or declarations of legislative intent, purpose, findings, or policy;
- are authorized as necessary interpretations of the specific requirements of Wis. Stat. §§ 175.49 and 175.60 and are not based on authority derived from any other general powers or duties of DOJ; and
- do not impose any standards or requirements that are more restrictive than the standards and requirements contained in Wis. Stat. §§ 175.49 and 175.60.

For these reasons, the proposed rule changes are authorized by Wis. Stat. § 227.11(2)(a).

4. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:

It is estimated that state employees will spend approximately 40 hours on the rulemaking process for the rules proposed here, primarily for compliance with required rulemaking procedures.

5. Description of all entities that may be impacted by the rule:

The proposed rules governing procedures and standards for the issuance and administration of concealed carry licenses under Wis. Stat. § 175.60 directly affect the interests of all Wisconsin residents who wish to apply for a license to carry a concealed weapon. In addition, the proposed rules also indirectly affect the interest of the general public to the extent that the proper training and licensing of concealed carry licensees generally affects public safety.

The proposed rules governing procedures and standards for the issuance and administration of certification cards under Wis. Stat. § 175.49(3) directly affect the interests of all former federal and non-federal law enforcement officers residing in Wisconsin who wish to apply for such certification. In addition, the proposed rules also indirectly affect the interest of the general public to the extent that the proper firearm certification of former law enforcement officers generally affects public safety.

6. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:

For persons other than current and former law enforcement officers, the regulation of the carrying of concealed weapons is primarily governed at the state level. Numerous federal statutes and regulations restrict the possession of weapons that have been shipped in interstate commerce, but there are no federal regulations that relate to the licensing of concealed carry by such persons.

For qualified current and former law enforcement officers, state and local laws restricting the carrying of concealed firearms are federally preempted by 18 U.S.C. §§ 926B-926C (commonly referred to as “H.R. 218”). The provisions in 2011 Wis. Act 35 related to qualified current and former law enforcement officers

are state-law codifications of the corresponding provisions in H.R. 218. Similarly, the rules proposed here governing procedures and standards for the issuance and administration of concealed carry certification cards for qualified former law enforcement officers will implement corresponding provisions in the federal law.

Contact Person: Assistant Attorney General Thomas C. Bellavia, (608) 266-8690, bellaviatc@doj.state.wi.us

The statement of scope for these emergency rules was approved by the governor on November 24, 2021.