

STATE OF WISCONSIN
Department of Justice

STATEMENT OF SCOPE OF PROPOSED EMERGENCY RULES

Rule No.: Wis. Admin. Code JUS 20 (Storage and processing of sexual assault kits)

Relating to: Storage and processing of sexual assault kits.

1. Description of the objectives of the emergency rules:

Consistent with Wis. Stat. § 165.775(6), as created by 2021 Wis. Act. 116, the State of Wisconsin Department of Justice (“DOJ”) proposes to promulgate emergency rules to conform to statutory requirements in Wis. Stat. §§ 165.775(1) through (5), as created by 2021 Wis. Act. 116. These provisions relate to the submission, processing, and storage of sexual assault kits collected from victims.

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

In the spring of 2016, as part of the Wisconsin Sexual Assault Kit Initiative (SAKI), DOJ initiated a process to inventory all previously unsubmitted sexual assault kits. Through a cooperative effort with Wisconsin law enforcement agencies and health care professionals, thousands of sexual assault kits were inventoried, culminating in almost 4,500 untested sexual assault kits being submitted by law enforcement agencies across the state to the Wisconsin State Crime Laboratories for processing.

As part of the SAKI project and associated multidisciplinary discussions, DOJ developed “best practice” guidance for its criminal justice partners involved in the receipt, investigative handling, and processing of sexual assault kit evidence from victims in Wisconsin. Continued kit inventory project efforts (termed a “kit census”) have maintained a method to catalogue and account for sexual assault kits in the state.

Reporting options for victims who provided evidence through a sexual assault kit were additionally created as a “best practice” guideline, allowing victims the choice of reporting the sexual assault crime to law enforcement with consent for analysis, or conversely, not reporting the crime to law enforcement when no consent is provided for the analysis of their kit. The sexual assault kits for which the victim chose the “non-reporting” option would be transferred by the collecting health care facility directly to the Wisconsin State Crime Laboratories for storage. DOJ determined these kits would be stored at the Wisconsin State Crime Laboratories for ten years, coinciding with the statute of limitations for second- and third-degree sexual assault offenses. If the non-reporting victim did not choose to report the crime after ten years from the date of the offense, the Wisconsin State Crime Laboratories would then dispose of the kit. If the non-reporting victim chose later to file a report of the sexual assault to law enforcement, this would cause the sexual assault kit to be removed from storage and processed by the Wisconsin State Crime Laboratories.

In 2021 Wis. Act 116, Wisconsin established statutes governing the submission and storage of sexual assault kits, which contain evidence collected as part of sexual assault forensic examinations of victims. The law describes options provided to the victims of sex offenses.

Victims are provided a choice at the time of evidence collection to either report the sexual assault crime to law enforcement and have their kit submitted for processing, or not report the crime to law enforcement or have their sexual assault kit analyzed. The law also creates timeframes associated with notifications and transfers of the sexual assault kit between health care professionals, law enforcement agencies, and the Wisconsin State Crime Laboratories. The law prescribes timeframes for storage of sexual assault kits applicable to both law enforcement agencies (concerning kits associated with reported crimes) and the Wisconsin State Crime Laboratories (concerning kits associated with non-reported crimes). 2021 Wis. Act 116 is consistent with and mirrors much of the “best practice” guidance previously developed by DOJ during the SAKI project.

2021 Wis. Act 116 impacts the following DOJ criminal justice partners, specified in Wis. Stat. § 165.775, as follows:

A. Health Care Professionals

Under Wis. Stat. § 165.775(2)(a) and (b), health care professionals must either (1) notify a Wisconsin law enforcement agency within 24 hours after collecting a sexual assault kit from a reporting victim, or (2) submit a sexual assault kit within 72 hours after collection to the Wisconsin State Crime Laboratories for storage, when the victim chooses not to report the crime to law enforcement. The statute does not, however, define procedures for these practices. The proposed emergency rules would develop a required practice and define processes for those criminal justice partners impacted by Wis. Stat. § 165.775(2)(a) to (b), namely, health care professionals.

B. Law Enforcement Agencies

Under Wis. Stat. § 165.775 (3)(a) to (c), law enforcement agencies are directed to respond and take possession of a sexual assault kit (from a reporting victim) from health care professionals within 72 hours of being notified, and then must submit the kit to the Wisconsin State Crime Laboratories for processing within 14 days after taking possession of the kit. Additionally, the statute directs law enforcement agencies to submit a sexual assault kit to the Wisconsin State Crime Laboratories for storage when, prior to the submission of the kit to the crime laboratory for processing, a victim provides notification that they choose to revoke their consent and no longer want to proceed with the analysis of their kit. The statute does not, however, define procedures for these practices. The proposed emergency rules would develop a required practice and define processes for those criminal justice partners impacted by Wis. Stat. § 165.775 (3)(a) to (c), namely, law enforcement agencies.

C. Wisconsin State Crime Laboratories

Under Wis. Stat. § 165.775(4)(a) and (b), the Wisconsin State Crime Laboratories is directed to take possession from health care professionals of a sexual assault kit from a victim who chooses not to report a crime to law enforcement and has not consented to have their kit analyzed. These provisions also direct the Wisconsin State Crime Laboratories to store the sexual assault kits received from these non-reporting victims for a period of ten years. During this ten-year storage period, the victim can choose to file a report of the crime to law enforcement and provide consent for the Wisconsin State Crime Laboratories to analyze their kit. Once the Wisconsin State Crime Laboratories receives notification of the report and consent for analyzing a victim’s sexual assault kit from the investigating law enforcement agency, the kit would be removed from storage and processed. The statute does not, however, define procedures for these practices. The proposed emergency rules would develop a required practice and define processes for those criminal justice partners impacted by Wis. Stat. § 165.775 (4)(a) to (b), namely, the Wisconsin State Crime Laboratories.

D. Post-processing Sexual Assault Kit Storage by Law Enforcement Agencies

Under Wis. Stat. § 165.775(5), law enforcement agencies are directed to take possession of a sexual assault kit from the Wisconsin State Crime Laboratories after processing is completed. The statute further prescribes a storage timeframe for the law enforcement agency: “notwithstanding s. 968.205, it shall securely store the sexual assault kit for a period of 50 years, or until the date of the expiration of the statute of limitations, or until the end of the term of imprisonment or probation of a person who was convicted in the sexual assault case, whichever is longer.” The proposed emergency rules would develop a required practice and define processes for those criminal justice partners impacted by Wis. Stat. § 165.775(5), namely, law enforcement agencies.

Additionally, 2021 Wis. Act 117 requires DOJ to establish a database, which shall be known as the Wisconsin Sexual Assault Kit Tracking System. 2021 Wis. Act. 117 § 1 (creating Wis. Stat. § 165.775(1) to (4)). The requirement of a sexual assault kit tracking system will provide transparency for future cataloging and transfers of sexual assault kits from victims. The kit tracking system will capture data in the creation, transfer, and processing timeline of sexual assault kits from victims, as handled by health care professionals, law enforcement agencies, and the Wisconsin State Crime Laboratories.

Accordingly, DOJ proposes to promulgate emergency rules to administer 2021 Wis. Act 116 and Wis. Stat. § 165.775(1) to (5), as required by law.

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

The proposed promulgation of these emergency rules is supported by Wis. Stat. §§ 227.11(2)(a), 227.24(1), and 165.775(6). Section 165.775(6) was created by 2021 Wis. Act. 116 and requires DOJ to promulgate emergency rules under section 227.24 within 180 days of the effective date of section 165.775. *See* 2021 Wis. Act. 116, §§ 2, 10(1).

Wisconsin Stat. § 227.11(2)(a) 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.

Wisconsin Stat. § 227.24(1) provides:

(a) An agency may, except as provided in s. 227.136(1), promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements under this chapter if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.

(b) An agency acting under s. 186.235(21), 215.02(18) or 220.04(8) may promulgate a rule without complying with the notice, hearing and publication procedures under this chapter.

(c) A rule promulgated under par. (a) takes effect upon publication in the official state newspaper or on any later date specified in the rule and, except as provided under sub. (2), remains in effect only for 150 days.

(d) A rule promulgated under par. (b) takes effect upon publication in the official state newspaper or on any later date specified in the rule and remains in effect for one year or until it is suspended or the proposed rule corresponding to it is objected to by the joint committee for review of administrative rules, whichever is sooner. If a rule under par. (b) is suspended or a proposed rule under s. 186.235 (21), 215.02 (18) or 220.04 (8) is objected to by the joint committee for review of administrative rules, any person may complete any transaction entered into or committed to in reliance on that rule and shall have 45 days to discontinue other activity undertaken in reliance on that rule.

(e) An agency that promulgates a rule under this subsection shall do all of the following:

1d. Prepare a statement of the scope of the proposed emergency rule as provided in s. 227.135(1), obtain approval of the statement as provided in s. 227.135(2), send the statement to the legislative reference bureau for publication in the register as provided in s. 227.135(3), and hold a preliminary public hearing and comment period if directed under s. 227.136(1). If the agency changes the scope of a proposed emergency rule as described in s. 227.135(4), the agency shall prepare and obtain approval of a revised statement of the scope of the proposed emergency rule as provided in s. 227.135(4). No state employee or official may perform any activity in connection with the drafting of a proposed emergency rule except for an activity necessary to prepare the statement of the scope of the proposed emergency rule until the governor and the individual or body with policy-making powers over the subject matter of the proposed emergency rule approve the statement.

1g. Submit the proposed emergency rule in final draft form to the governor for approval. The governor, in his or her discretion, may approve or reject the proposed emergency rule. If the governor approves a proposed emergency rule, the governor shall provide the agency with a written notice of that approval. An agency may not file an emergency rule with the legislative reference bureau as provided in s. 227.20 and an emergency rule may not be published until the governor approves the emergency rule in writing.

1m. Prepare a plain language analysis of the rule in the format prescribed under s. 227.14(2) and print the plain language analysis with the rule when it is published.

2. Prepare a fiscal estimate for the rule in the format prescribed under s. 227.14(4), mail the fiscal estimate to each member of the legislature, and send a copy of the fiscal estimate to the legislative reference bureau in an electronic format approved by the legislative reference bureau, not later than 10 days after the date on which the rule is published.

Wisconsin Stat. § 165.775(6), as created by 2021 Wis. Act. 116, provides that “[t]he department shall promulgate rules to administer this section.”

2021 Wis. Act. 116, § 2 provides, in pertinent part:

Section 2. 165.775 of the statutes is created to read:

165.775 Sexual assault kits. (1) . . .

(6) The department shall promulgate rules to administer this section.

2021 Wis. Act. 116, § 10(1) provides:

Section 10. Nonstatutory provisions.

(1) Within 180 days of the effective date of this subsection, the department of justice shall promulgate emergency rules under s. 227.24 to implement s. 165.775 for the period before the effective date of the permanent rules but not to exceed the period authorized under s. 227.24(1)(c), subject to extension under s. 227.24(2). Notwithstanding s. 227.24 (1)(a), (2)(b), and (3), the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

These statutes and 2021 Wis. Act 116 expressly confer on DOJ the power to promulgate emergency rules interpreting the provisions in Wis. Stat. § 165.775 that are to be enforced or administered by DOJ to effectuate the purpose of those statutory provisions and the act, as long as the emergency rules do not exceed the bounds of correct interpretation of the governing statutes.

DOJ finds that the promulgation of the proposed emergency rules is appropriate to comply with the Legislature’s direction that DOJ promulgate emergency rules, as described in the preceding sections of this statement. DOJ further finds that the emergency rules here proposed:

- do not exceed the bounds of correct interpretation of Wis. Stat. § 165.775;
- are authorized by the statutes and act 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. § 165.775 and 2021 Wis. Act. 116 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. § 165.776.

For these reasons, the proposed rule changes are authorized by Wis. Stat. §§ 227.11(2)(a), 227.24(1), and 165.775(6), as created by 2021 Wis. Act. 116.

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

It is estimated that state employees will spend approximately 60 hours on the rulemaking process for the emergency rules proposed here, primarily for compliance with required rulemaking procedures.

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

Several entities may be impacted by the proposed emergency rules. First, DOJ may be impacted, as it is the state agency primarily tasked with administering the changes to the law enacted in 2021 Wis. Act 116. Second, law enforcement agencies and district attorneys and their staffs may be impacted. Third, health care professionals, including those who work for hospitals and clinics, may be impacted. Fourth, the Wisconsin State Crime Laboratories may be impacted.

The nature of these potential impacts of the proposed emergency rules are described in more detail in section 2 of this scope statement.

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

Congress enacted the Survivors' Bill of Rights Act of 2016, which was signed into law on October 7, 2016. *See* 18 U.S.C. § 3772. This law gives sexual assault survivors several rights, including: (1) the right not to be prevented from, or charged for, receiving a medical forensic examination; (2) the right to have a sexual-assault evidence collection kit or its probative contents preserved, without charge, for the duration of the maximum applicable statute of limitations or 20 years, whichever is shorter; (3) the right to be informed of any result of a sexual assault evidence collection kit, including a DNA profile match, toxicology report, or other information collected as part of a medical forensic examination, if such disclosure would not impede or compromise an ongoing investigation; (4) the right to be informed in writing of policies governing the collection and preservation of a sexual assault evidence collection kit; (5) the right to, upon written request, receive written notification from the appropriate official with custody not later than 60 days before the date of the intended destruction or disposal of the sexual assault evidence collection kit; and (6) the right to, upon written request, be granted further preservation of the kit or its probative contents. 18 U.S.C. §§ 3772(a)(1)–(3)(B).

18 U.S.C. § 3772 generally addresses the same activities that the proposed emergency rules will address, namely, the storage and processing of sexual assault kits and related evidence. However, the federal law is about providing specific rights to crime victims; whereas the proposed emergency rules will be about establishing how the Wisconsin Department of Justice will administer and execute the statutes governing storage and processing of sexual assault kits, namely Wis. Stat. § 165.775.

In 2021, a bill was proposed in Congress to enact the Survivors' Bill of Rights in the States Act of 2021. *See* Survivors' Bill of Rights in the States Act of 2021, H.R. 4978, 117th Cong. § 1 (2021). The bill was introduced in the U.S. House of Representatives on August 6, 2021. It would create an incentive for states to put in place laws that provide to sexual assault survivors the rights, at a minimum, under 18 U.S.C. § 3772. It would enable the U.S. Attorney General to make grants to those states equal to 10 percent of the average of the amount of funding of the three most recent awards that a state received under part T of title I of the Omnibus Crime Control and Safe Streets Act of 1968, 34 U.S.C. § 10441 et seq., commonly referred to as the STOP Violence Against Women Formula Grant Program.

This proposed legislation involves grant funding, and the proposed emergency rules do not address grants or funding sources for sexual-assault kit analysis.

Lastly, 32 C.F.R. § 114, addressing "Victim and Witness Assistance" in cases involving offenses by military personnel, establishes certain rights for sexual assault victims. These include the rights to: (1) have a "sexual assault evidence collection kit or its probative contents preserved, without charge"; (2) be informed of the result of such kits; (3) be informed in writing of policies governing the collection and preservation of such kits; (4) upon written request, receive written notification from the appropriate official with custody not less than 60 days before the intended destruction or disposal of the kit; and (5) upon written request, be granted further preservation of such kits or their probative contents. 32 C.F.R. § 114.6(b)(1)(xi), (xii), (xiii), (xiv), (xv).

These federal regulations generally address the same activities that the proposed emergency rules will address, namely, the storage and processing of sexual assault kits and related evidence. However, the federal regulations are about providing specific rights to victims of particular crimes by military personnel; whereas the proposed emergency rules will be about establishing how the Wisconsin Department of Justice will administer and execute the statutes governing storage and processing of sexual assault kits, namely Wis. Stat. § 165.775.

Contact Person: Assistant Attorney General Clayton P. Kawski, (608) 266-8649, kawskicp@doj.state.wi.us.