



STATE OF WISCONSIN
Department of Justice

**ORDER OF
THE WISCONSIN DEPARTMENT OF JUSTICE
TO ADOPT RULES**

The Wisconsin Department of Justice (“DOJ”) proposes an order to create ch. Jus 21, relating to the tracking of sexual assault kits in sexual assault cases.

The statement of scope for these rules, SS 024-22, was approved by the Governor on March 24, 2022, published in the Administrative Register, No. 785B, on March 28, 2022, and approved by the Attorney General on April 13, 2022. The Governor approved these rules on _____.

**ANALYSIS PREPARED BY THE
WISCONSIN DEPARTMENT OF JUSTICE**

Statutes interpreted: ss. 165.776(1) to (3), Stats.

Statutory authority: ss. 227.11(2)(a) and 165.776(4), Stats.

Explanation of agency authority:

The promulgation of these rules is supported by ss. 227.11(2)(a) and 165.776(4), Stats.

Section 227.11(2)(a), Stats., 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. § 165.776(4), as created by 2021 Wis. Act. 117, provides that “[t]he department shall promulgate rules to administer this section.” 2021 Wis. Act. 117, § 1 provides, in pertinent part: “(4) The department shall promulgate rules to administer this section.”

This statute and 2021 Wis. Act 117 expressly confer on DOJ the power to promulgate rules interpreting the provisions in s. 165.776, Stats., that are to be enforced or administered by DOJ to effectuate the purpose of those statutory provisions and the act, as long as the rules do not exceed the bounds of correct interpretation of the governing statutes.

DOJ finds that the promulgation of the rules is appropriate to comply with the Legislature's direction that DOJ promulgate rules. DOJ further finds that the rules:

- do not exceed the bounds of correct interpretation of s. 165.776, Stats.;
- 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 s. 165.776, Stats., and 2021 Wis. Act 117 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 s. 165.776, Stats.

For these reasons, the rules are authorized by ss. 227.11(2)(a) and 165.776(4), Stats., as created by 2021 Wis. Act 117.

Related statutes or rules: ss. 165.775, Stats.; Wis. Admin. Code ch. Jus 20.

Plain-language analysis:

In 2021 Wis. Act 117, Wisconsin established statutes governing the tracking of sexual assault kits, which contain evidence collected as part of sexual assault forensic examinations of victims. The law describes an electronic database, which shall be known as the Wisconsin Sexual Assault Kit Tracking System, to allow victims of sexual assault the ability to anonymously access information about the location and status of any sexual assault kit the victim has provided, notwithstanding other limitations on accessing the information in s. 165.79(1), Stats. The law further defines that the Wisconsin Sexual Assault Kit Tracking System shall allow continuous and ongoing access by criminal justice partners and DOJ to update and track the location and status of sexual assault kits, including the initial collection of evidence, receipt and storage at law enforcement agencies, receipt and analysis at forensic laboratories, and destruction.

2021 Wis. Act 117 impacts the following DOJ criminal justice partners, specified in s. 165.776, Stats., as follows:

A. Wisconsin Law Enforcement Agencies and Health Care Professionals

Under s. 165.776(3)(a), Stats., whenever Wisconsin law enforcement agencies or health care professionals collect a sexual assault kit from a victim, they shall enter the information required into the Wisconsin Sexual Assault Kit Tracking System. The statute does not, however, define procedures for these practices. The proposed rules would develop a required practice and define processes for those criminal justice partners impacted by s. 165.776(3)(a), Stats., namely, law enforcement agencies and health care professionals.

B. Wisconsin State Crime Laboratories

Under s. 165.776(3)(b), Stats., the Wisconsin State Crime Laboratories shall enter the information required into the Wisconsin Sexual Assault Kit Tracking System. The statute does not, however, define procedures for these practices. The proposed rules would develop a required practice and define processes for those criminal justice partners impacted by s. 165.776(3)(b), Stats., namely, crime laboratories.

Consistent with the above information, the rules cover five subject areas, which are separated into different sections.

First, section Jus 21.01 describes DOJ's authority for promulgating the rules, with a specific citation to the enabling statute.

Second, section Jus 21.02 includes three definitions of phrases that are used in the rules. These phrases, "health care professional," "reporting victim," and "sexual assault kit" are used in the rules to specify particular types of health care personnel, kits, and victims who will be impacted by the procedures that the rules establish. Defining these terms is important to readers of the rules because these defined terms are terms of art used in the field of law enforcement, and lay people

would not necessarily be familiar with them. Further, the phrases “health care professional” and “sexual assault kit” are defined in the Wisconsin Statutes and should be defined consistently in the rules.

Third, section Jus 21.03 establishes procedures relating to the tracking of sexual assault kits pertinent to health care professionals. After collecting evidence in a sexual assault kit, the rules require health care professionals to enter information regarding the kit into the Wisconsin Sexual Assault Kit Tracking System.

Fourth, section Jus 21.04 establishes procedures relating to the tracking of sexual assault kits pertinent to law enforcement agencies. Law enforcement agencies must take possession of sexual assault kits from victims and enter information regarding the kits into the Wisconsin Sexual Assault Kit Tracking System. The rules explain what must happen for kits collected by health care professionals inside and outside Wisconsin. The rules explain what law enforcement agencies should do with information about kits when a victim does not want to proceed with analysis of the kit or changes his or her mind about the processing of the kit. The rules also require law enforcement agencies to enter information into the Wisconsin Sexual Assault Kit Tracking System after the kit has been processed by the state crime laboratories and received by the law enforcement agency.

Lastly, section Jus 21.05 establishes procedures relating to the tracking of sexual assault kits pertinent to the state crime laboratories. The state crime laboratories must insert information into the Wisconsin Sexual Assault Kit Tracking System for sexual assault kits from law enforcement agencies and health care professionals. After processing, the state crime laboratories also must enter information regarding the kit into the Wisconsin Sexual Assault Kit Tracking System. And when a sexual assault kit is destroyed by the state crime laboratories after 10 years of storage, the state crime laboratories must enter information about the kit into the Wisconsin Sexual Assault Kit Tracking System.

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

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 rules will address, namely, the tracking of sexual assault kits and related evidence. However, the federal law is about providing specific rights to crime victims; whereas the proposed rules will be about establishing how DOJ will administer and execute the statutes governing tracking sexual assault kits, namely Wis. Stat. § 165.776.

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 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 rules will address, namely, the tracking 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 rules will be about establishing how DOJ will administer and execute the statutes governing the tracking of sexual assault kits, namely Wis. Stat. § 165.776.

Comparison with rules in adjacent states:

Illinois: In Illinois, the Sexual Assault Evidence Submission Act governs sexual assault kit evidence collection, storage, and processing. 725 ILCS 202. It includes provisions addressing: the submission, analysis, and inventorying of evidence; reporting regarding sexual assault cases; rulemaking regarding evidence; a sexual assault kit evidence tracking system; and other related provisions. 725 ILCS 202/10 to 202/50. Similarly, the Sexual Assault Incident Procedure Act, 725 ILCS 203, includes provisions regarding: victim notification; sexual assault incident policies; reports by law enforcement officers; third-party reports; victim notice; release and storage of sexual assault evidence; and release of other information. 725 ILCS 203/11 to 203/35.

Iowa: In Iowa, Iowa Code section 709.10 governs evidence of sexual abuse. It establishes a sexual assault kit tracking system. I. C. A. § 709.10.1.c., 2.–3., 8.–9. The law addresses how health care providers and law enforcement agencies are to collect, process, and document sexual assault kit evidence. I. C. A. § 709.10.4.–5. Law enforcement agencies are required to store the kit for a minimum of 15 years or, in the case of a minor victim, for 15 years after the minor reaches the age of majority. I. C. A. § 709.10.6. The law addresses disposal of sexual assault kits. I. C. A. § 709.10.7. It also addresses victim consent. I. C. A. § 709.10.11.a.–e.

Michigan: In Michigan, the Michigan Legislature enacted the Sexual Assault Kit Evidence Submission Act in 2014. This law governs sexual assault kit evidence collection, storage, and processing, and it includes provisions that specifically address the duties of health care facilities, written victim consent, notice to law enforcement agencies, the duties of law enforcement agencies, and destruction of sexual assault kit evidence. Mich. Comp. Laws. Ann. §§ 752.931–.935.

Minnesota: In Minnesota, Minn. Stat. § 299C.106 governs sexual assault kit handling, submission, and storage. Specifically, the law requires law enforcement agencies to retrieve unrestricted sexual assault examination kits from health care professionals within 10 days of receiving notice that the kit is available for transfer. Minn. Stat. § 299C.106, subd. 2. Within 60 days of receiving an unrestricted sexual assault examination kit, a law enforcement agency must submit the kit for testing to a forensic laboratory. Minn. Stat. § 299C.106, subd. 3. The law also mandates that a uniform consent form be developed and distributed and that a searchable database providing sexual assault victims with information on the status of their individual sexual assault examination kit be maintained. Minn. Stat. § 299C.106, subsd. 3a., 3b.

Summary of factual data and analytical methodologies: The rules are predicated on legal analysis by DOJ staff of the language and requirements of 2021 Wis. Act. 117 and s. 165.776, Stats. Based on that analysis, DOJ has determined that the rules are necessary for DOJ to carry out its responsibilities under 2021 Wis. Act 117 and s. 165.776, Stats.

Fiscal estimate: DOJ has prepared a fiscal estimate that is being filed herewith.

Effect on small business: The rules will have no effect on small businesses.

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Place where comments are to be submitted and deadline for submission: Comments may be submitted to the contact person shown above no later than one week after the public hearing on these rules is conducted. Information as to the date, location, and time of the public hearing will be published in the Wisconsin Administrative Register.

TEXT OF THE RULE

SECTION 1. Chapter Jus 21 is created to read:

CHAPTER JUS 21

TRACKING OF SEXUAL ASSAULT KITS IN SEXUAL ASSAULT CASES

JUS 21.01 Authority. The Wisconsin Department of Justice has promulgated these rules pursuant to the authority granted by s. 165.776(4), Stats.

JUS 21.02 Definitions. In this chapter:

(1) “Health care professional” has the meaning given in s. 165.775(1)(b), Stats.

(2) “Reporting victim” means a person who reports to a law enforcement agency that he or she was sexually assaulted.

(3) “Sexual assault kit” has the meaning given in s. 165.775(1)(e), Stats.

JUS 21.03 Health care professional procedures. Health care professionals shall:

(1) Upon collection of a victim’s sexual assault kit, enter the information for the kit in the required fields defined by the Wisconsin Sexual Assault Kit Tracking System.

JUS 21.04 Law enforcement agency procedures. Law enforcement agencies shall:

(1) Upon taking possession of a sexual assault kit for a reporting victim from a health care professional in Wisconsin, enter the information for the kit in the required fields defined by the Wisconsin Sexual Assault Kit Tracking System.

(2) Upon taking possession of a sexual assault kit for a reporting victim from a health care professional who collected the evidence outside of Wisconsin, and where the kit does not contain the Wisconsin Sexual Assault Kit Tracking System barcodes, notify the state crime laboratories for assistance.

(3) When, after taking possession of a sexual assault kit from a health care professional in Wisconsin, but before submitting it to the state crime laboratories for processing, the reporting victim notifies the law enforcement agency that the victim does not want to proceed with analysis of the kit, notify the state crime laboratories of these facts to assist the state crime laboratories in updating the information for the kit in the required fields defined by the Wisconsin Sexual Assault Kit Tracking System.

(4) Notify the state crime laboratories whenever a victim, after having first chosen not to report a sexual assault as provided in Jus 20.03 (2) or notified the law enforcement agency that the victim does not want to proceed with analysis of the kit as provided in sub. (3), notifies the law enforcement agency that the victim does want to proceed with analysis of the kit to allow the state crime laboratories to update the information for the kit in the required fields defined by the Wisconsin Sexual Assault Kit Tracking System.

(5) Upon receiving a victim's sexual assault kit from the state crime laboratories after it has been processed, enter the information for the kit in the required fields defined by the Wisconsin Sexual Assault Kit Tracking System.

JUS 21.05 State crime laboratories procedures. The state crime laboratories shall:

(1) Upon taking possession of a sexual assault kit from a victim submitted by a Wisconsin law enforcement agency, enter the information for the kit in the required fields defined by the Wisconsin Sexual Assault Kit Tracking System.

(2) Upon taking possession of a sexual assault kit collected from a victim and submitted by a health care professional in Wisconsin, enter the information for the kit in the required fields defined by the Wisconsin Sexual Assault Kit Tracking System.

(3) After processing is complete for a sexual assault kit from a reporting victim and the kit is ready to be returned to the submitting law enforcement agency, enter the information for the kit in the required fields defined by the Wisconsin Sexual Assault Kit Tracking System.

(4) When a sexual assault kit from victim is destroyed by the state crime laboratories after the 10-year storage period provided in s. 165.775(4)(a), Stats., enter the information for the kit in the required fields defined by the Wisconsin Sexual Assault Kit Tracking System.

SECTION 2. EFFECTIVE DATE. These rules take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2) (intro.), Stats.

(END OF TEXT OF THE RULE)

WISCONSIN DEPARTMENT OF
JUSTICE

Dated: _____

Agency: _____
Joshua L. Kaul
Attorney General