



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

**January 2011 Special Session
Assembly Bill 8**

**Assembly Substitute
Amendment 1, as Amended,
and Senate Amendment 1**

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January 2011 Special Session Assembly Bill 8 makes changes to the promulgation of administrative rules, including changes relating to agency authority to promulgate rules; gubernatorial approval of statements of scope and final drafts of proposed rules; economic impact analyses; and venue in judicial review actions and in actions against the state.

Agency Authority to Promulgate Rules and Implement Standards

January 2011 Special Session Assembly Bill 8 provides that no agency may implement or enforce any standard, requirement, or threshold as a term or condition of any license issued by the agency unless the implementation or enforcement is expressly required or permitted by statute or by rule. The *bill* also allows the Governor, by executive order, to prescribe standards to ensure that rules are promulgated in compliance with subch. II of ch. 227, Stats.

Further, the *bill* provides that all of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

- 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 expressly conferred on the agency by the Legislature.
- 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 expressly conferred on the agency by the Legislature.
- 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.

Assembly Substitute Amendment 1 to January 2011 Special Session Assembly Bill 8 also contains these provisions.

Gubernatorial Approval of Statements of Scope

January 2011 Special Session Assembly Bill 8 requires that an agency submit a statement of the scope of a proposed rule to the Governor and to the individual or body with policy-making powers over the subject matter of the proposed rule for approval. The agency may not send the scope statement to the Legislative Reference Bureau (LRB) for publication until the Governor issues a written notice of approval of the statement. In addition, the *bill* prohibits a state employee or official from performing any activity in connection with the drafting of a proposed rule, except for an activity necessary to prepare the scope statement, until the Governor and the individual or body with policy-making powers over the subject matter of the proposed rule approve the statement.

Further, the *bill* requires that if an agency changes the scope of the proposed rule in any meaningful or measurable way, the agency must prepare and obtain approval of a revised scope statement in the same manner as the original statement was prepared and approved. No state employee or official may perform any activity in connection with the drafting of the proposed rule, except for an activity necessary to prepare the revised scope statement, until the revised scope statement is approved.

Assembly Substitute Amendment 1 also contains these provisions.

Gubernatorial Approval of Final Drafts of Proposed Rules

January 2011 Special Session Assembly Bill 8 requires that an agency submit a proposed rule that is in final draft form to the Governor for approval. The Governor may approve, modify, or reject the proposed rule, and, if the Governor approves a proposed rule, he or she must provide the agency with a written notice of that approval. A proposed rule may not be submitted to the Legislature for review unless the Governor has approved the proposed rule in writing.

Assembly Substitute Amendment 1 also contains these provisions, except that it removes the authority of the Governor to modify a proposed rule. Instead, the Governor may approve or reject the proposed rule.

Economic Impact Analyses

January 2011 Special Session Assembly Bill 8 requires that an agency prepare an economic impact analysis for a proposed rule before submitting the rule to the Legislative Council staff for review. An economic impact analysis must contain information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, and the state's economy as a whole. When preparing the analysis, the agency must solicit information and advice from businesses, associations representing businesses, local governmental units, and individuals that may be affected by the proposed rule. The agency may request information that is reasonably necessary for the preparation

of an economic impact analysis from other businesses, associations, local governmental units, and individuals and from other agencies. The economic impact analysis must include all of the following:

- An analysis and quantification of the policy problem that the proposed rule is intending to address, including comparisons with the approaches used by the federal government and by Illinois, Iowa, Michigan, and Minnesota to address that policy problem and, if the approach chosen by the agency to address that policy problem is different from those approaches, a statement as to why the agency chose a different approach.
- An analysis and detailed quantification of the economic impact of the proposed rule, including the implementation and compliance costs that are reasonably expected to be incurred by or passed along to the businesses and individuals that may be affected by the proposed rule.
- An analysis of the actual and quantifiable benefits of the proposed rule, including an assessment of how effective the proposed rule will be in addressing the policy problem that the rule is intended to address.
- An analysis of alternatives to the proposed rule, including the alternative of not promulgating the proposed rule.
- A determination made in consultation with the businesses and individuals that may be affected by the proposed rule as to whether the proposed rule would adversely affect in a material way the economy, a sector of the economy, productivity, jobs, or the overall economic competitiveness of the state.

The **bill** requires that an agency submit the economic impact analysis to the Legislative Council staff, the Department of Administration (DOA), the Governor, and the Chief Clerk of each house of the Legislature.

Further, the **bill** requires that if a proposed rule is modified after the economic impact analysis is submitted so that the economic impact of the proposed rule is significantly changed, the agency must prepare a revised economic impact analysis for the proposed rule as modified. A revised economic impact analysis must be prepared and submitted in the same manner as an original economic impact analysis is prepared and submitted.

If an economic impact analysis regarding a proposed rule indicates that a total of \$20,000,000 or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses and individuals as a result of the proposed rule, the **bill** requires that DOA review the proposed rule and issue a report. The agency may not submit a proposed rule to the Legislature for review until the agency receives a copy of DOA's report and the approval of the DOA Secretary. The report must include all of the following findings:

- That the economic impact analysis is supported by related documentation contained or referenced in the economic impact analysis.
- That the agency has statutory authority to promulgate the proposed rule.

- That the proposed rule, including any administrative requirements, is consistent with and not duplicative of other state rules or federal regulations.
- That the agency has adequately documented the factual data and analytical methodologies that the agency used in support of the proposed rule and the related findings that support the regulatory approach that the agency chose for the proposed rule.

Lastly, the *bill* requires that the Legislative Council staff include, or provide a link to, the economic impact analysis on its administrative rules Internet site. A notice of a hearing on a proposed rule must include the economic impact analysis and any report prepared by DOA, or a summary of that analysis and report and a description of how a copy of the full analysis and report may be obtained from the agency at no charge.

Assembly Substitute Amendment 1 also contains these provisions.

Assembly Amendment 10 to Assembly Substitute Amendment 1 requires that an agency prepare an economic impact analysis in coordination with local governmental units that may be affected by the proposed rule. The amendment also adds “local government units” to several provisions relating to economic impact analyses, thus requiring the following:

- That an economic impact analysis contain information on the economic effect of the proposed rule on *local governmental units*.
- That an economic impact analysis include an analysis and detailed quantification of the economic impact of the proposed rule, including the implementation and compliance costs that are reasonably expected to be incurred by or passed along to *local governmental units* that may be affected by the proposed rule.
- That an economic impact analysis include a determination made in consultation with the *local governmental units* that may be affected by the proposed rule as to whether the proposed rule would adversely affect in a material way the economy, a sector of the economy, productivity, jobs, or the overall economic competitiveness of the state.
- If an economic impact analysis regarding a proposed rule indicates that a total of \$20,000,000 or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses, *local government units*, and individuals as a result of the proposed rule, that DOA review the proposed rule and issue a report.

Emergency Rules

January 2011 Special Session Assembly Bill 8 requires that an agency prepare a statement of the scope of a proposed emergency rule and obtain approval of the statement by the Governor and the individual or body with policy-making powers over the subject matter of the emergency rule. If the agency changes the scope of a proposed emergency rule, the agency must prepare and obtain approval of a revised scope statement. In addition, the bill requires that an agency submit a proposed emergency rule in final draft form to the Governor for approval. An agency may not file an emergency rule for publication until the Governor approves the emergency rule in writing.

Assembly Substitute Amendment 1 contains these provisions, except that it specifies that the Governor may approve or reject a proposed emergency rule. If the Governor approves a proposed emergency rule, the Governor must provide the agency with a written notice of that approval.

In addition, the *bill* requires that an agency, before filing a proposed emergency rule with the LRB, prepare an economic impact analysis for a proposed emergency rule and submit that analysis to DOA, the Governor, and the Chief Clerk of each house of the Legislature. If the economic impact analysis indicates that a total of \$20,000,000 or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses and individuals as a result of the proposed emergency rule, DOA must review the proposed rule and issue a report. The agency may not file the proposed emergency rule until the agency receives a copy of DOA's report and the approval of the DOA Secretary. The *substitute amendment* removes the provisions described in this paragraph.

Legislative Review of Proposed Rules

January 2011 Special Session Assembly Bill 8 does not contain the provisions described in this section.

Assembly Substitute Amendment 1 provides that a notice of a proposed rule that is received by the Legislature on or after the last of the Legislature's final general-business floorperiod in the biennial session will be considered received on the first day of the next regular session of the Legislature, unless the presiding officers of both houses direct referral of the notice and report before that day. [Current law provides that a notice of a proposed rule that is received by the Legislature on or after September 1 of an even-numbered year will be considered received on the first day of the next regular session of the Legislature.]

The *substitute amendment* provides that if a notice and report is received by the Legislature after the last day of the Legislature's final general-business floorperiod and is referred for committee review before the first day of the next regular session of the Legislature, the committee review period for each committee extends to the day that the next Legislature convenes.

In addition, the *substitute amendment* provides that when a committee's jurisdiction over a proposed rule is concluded, the committee must report the proposed rule and any objection to the Joint Committee for Review of Administrative Rules (JCRAR). The review period for JCRAR extends for 30 days, unless extended by action of the JCRAR Co-Chairs, after the last referral of a proposed rule and objection to JCRAR. During that review period, JCRAR may take any action on the proposed rule in whole or in part. JCRAR must meet and take action during that period with respect to any proposed rule or any part of a proposed rule to which a committee has objected and may meet and take action during that period with respect to any proposed rule or any part of a proposed rule to which no committee has objected.

However, if a notice and report is received by the Legislature after the last day of the Legislature's final general-business floorperiod and is referred for committee review before the first day of the next regular session of the Legislature, the *substitute amendment* provides that the review period for JCRAR extends to the day that the next Legislature convenes. During that review period, JCRAR may meet and take action on the proposed rule in whole or in part. If JCRAR meets in executive session

with respect to a proposed rule or part of a proposed rule to which a committee has objected, JCRAR must take action with respect to the committee's objection.

Further, the *substitute amendment* provides that if a committee or JCRAR has not concluded its jurisdiction over a proposed rule or a part of a proposed rule before the day that the next Legislature convenes, that jurisdiction ceases and the proposed rule or part of the proposed rule is referred to the appropriate standing committee or JCRAR of the next Legislature, which begins a new committee review period.

Lastly, the *substitute amendment* prohibits an agency from promulgating a proposed rule or a part of a proposed rule until JCRAR nonconcur in the objection of a committee, concurs in the approval of the committee, otherwise approves the proposed rule or part of the proposed rule, waives its jurisdiction over the proposed rule or part of the proposed rule, or until a bill introduced to prevent promulgation of the proposed rule fails to be enacted.

JCRAR Objection

January 2011 Special Session Assembly Bill 8 does not contain the provision described in this section.

Assembly Substitute Amendment 1 provides that if JCRAR objects to a proposed rule or a part of a proposed rule, JCRAR must report the proposed rule or part of the proposed rule and objection to the Governor within five working days after making the objection. Within 30 days after the proposed rule or part of the proposed rule and objection are reported to the Governor, he or she must review the proposed rule and objection and may either sustain, nonconcur in, or not act on the objection. If the Governor sustains or does not act on the objection, an agency may not promulgate the proposed rule or part of the proposed rule objected to. If the Governor nonconcur in the objection, an agency may not promulgate the proposed rule or part of the proposed rule objected to until a bill introduced to prevent promulgation of the proposed rule fails to be enacted.

Assembly Amendment 1 to Assembly Substitute Amendment 1 removes this provision.

Venue in Judicial Review Actions and in Actions Against State

January 2011 Special Session Assembly Bill 8 provides that the exclusive means of judicial review of the validity of a rule must be an action for declaratory judgment as to the validity of the rule brought in the circuit court for the county where the party asserting the invalidity of the rule resides or has its principal place of business or, if that party is a nonresident or does not have its principal place of business in this state, in the circuit court for Dane County.

In addition, the *bill* provides that all actions in which the sole defendant is the state, any state board or commission, or any state officer, employee, or agent in an official capacity must be venued in the county where the plaintiff resides unless another venue is specifically authorized by law. If the plaintiff is a nonresident or is not a natural person, the action must be venued in the county where the dispute arose.

Assembly Substitute Amendment 1 also contains these provisions.

Other

Assembly Amendment 2 to Assembly Substitute Amendment 1 makes technical changes to the substitute amendment. *Assembly Amendment 1 to Assembly Amendment 2* corrects an error in Assembly Amendment 2.

Senate Amendment 1

Senate Amendment 1 makes the following changes to January 2011 Special Session Assembly Bill 8, as amended by the Assembly:

- Modifies provisions relating to agency authority to promulgate rules.

SECTION 1 of the *bill* provides that:

No agency may implement or enforce any standard, requirement, or threshold as a term or condition of any license issued by the agency unless such implementation and enforcement is expressly required or permitted by statute or by a rule that has been promulgated in accordance with this subchapter. The governor, by executive order, may prescribe standards to ensure that rules are promulgated in compliance with this subchapter.

Senate Amendment 1 replaces the above provision with the following:

No 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 a statute or by a rule that has been promulgated in accordance with this subchapter. The governor, by executive order, may prescribe *guidelines* to ensure that rules are promulgated in compliance with this subchapter. [Emphasis added.]

SECTION 3 of the *bill* limits an agency's rulemaking authority to that which is expressly conferred on the agency by the Legislature. *Senate Amendment 1* changes "expressly" to "explicitly" in these provisions.

- Clarifies that economic impact analyses are *not* required for emergency rules.
- Requires Internet posting of revised economic impact analyses.

The *bill* requires the Legislative Council staff to post or provide a link to any economic impact analysis of a proposed rule submitted by a state agency. *Senate Amendment 1* specifies that the Legislative Council staff must also post or provide a link to any *revised* economic impact analyses submitted by state agencies.

- Requires revised economic impact analyses to be included as part of the report provided to the Chief Clerks of each house of the Legislature when a proposed rule is in final draft form.

The *bill* requires that when an agency submits a final draft rule to the Legislature, it must be accompanied by a report that includes, among other items, a copy of the economic impact analysis prepared by the agency. *Senate Amendment 1* specifies that the agency must also include in the report a *revised* economic impact analysis, if one has been prepared.

- Clarifies that JCRAR has passive review authority over rules that were not objected to by a standing committee.

Under the *bill*, all rules are referred to JCRAR, even those that were not objected to by a standing committee. *Senate Amendment 1* clarifies that JCRAR does have passive review authority with respect to those rules.

- Modifies provisions regarding venue for administrative rule declaratory judgment proceedings.

Under the *bill*, if a party challenging the validity of an administrative rule is a nonresident or does not have its principal place of business in the state, the declaratory judgment proceeding must be brought in Dane County Circuit Court. *Senate Amendment 1* instead provides that if the party is a nonresident or does not have its principal place of business in the state, the declaratory judgment proceeding must be brought in the county where the dispute arose.

- Modifies provisions regarding venue in other civil actions against the state.

Under the *bill*, venue for all civil actions in which the sole defendant is the state, a state board or commission, or a state officer, employee, or agent in an official capacity is in the county where the plaintiff resides unless another venue is specifically authorized by law. If the plaintiff is a nonresident or is not a natural person, the action must be venued in the county where the dispute arose. *Senate Amendment 1* restores current law to provide that all these actions shall be venued in Dane County unless another venue is specifically authorized by law, except that venue for proceedings challenging the validity of administrative rules is as described, above.

- Requires insertion of notations in the Wisconsin Administrative Code and the Wisconsin Administrative Register when a circuit court issues a declaratory judgment as to the validity of a rule.

Senate Amendment 1 requires that when a circuit court enters a final order in a declaratory judgment action on the validity of a rule, the court must notify the LRB of the court's determination as to the validity or invalidity of the rule. The LRB must publish a notice of that determination in the Wisconsin Administrative Register and insert an annotation of that determination in the Wisconsin Administrative Code.

Legislative History

Assembly Substitute Amendment 1 was offered by Representative Tiffany, and Assembly Amendments 1 and 2 to Assembly Substitute Amendment 1 were offered by Representative J. Ott. Assembly Amendment 10 to Assembly Substitute Amendment 1 and Assembly Amendment 1 to Assembly Amendment 2 to Assembly Substitute Amendment 1 were offered by the Assembly Committee on Judiciary and Ethics.

On January 27, 2011, the Assembly Committee on Judiciary and Ethics recommended adoption of the amendments on votes of Ayes, 8; Noes, 0. The committee then recommended adoption of the substitute amendment, as amended, and passage of the bill, as amended, on votes of Ayes, 5; Noes, 3. On February 2, 2011, the Assembly adopted the amendments on voice votes and adopted the substitute amendment on a vote of Ayes, 59; Noes, 34. The Assembly then passed the bill, as amended, on a vote of ayes, 59; Noes, 34.

Senate Amendment 1 was offered by the Senate Committee on Economic Development and Veterans and Military Affairs. On February 10, 2011, the Senate adopted Senate Amendment 1 on a voice vote and concurred in January 2011 Special Session Assembly Bill 8, as amended, on a vote of Ayes, 18; Noes, 14.

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