



## Emergency Rulemaking Process

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State agencies promulgate administrative rules pursuant to rulemaking authority conferred by the Legislature. The Legislature retains oversight of the rulemaking process through the procedures contained in subch. II of ch. 227, Stats. These oversight procedures include the review of proposed permanent rules by the Legislative Council's Administrative Rules Clearinghouse, legislative standing committees in each house, and the Joint Committee for Review of Administrative Rules (JCRAR).

While agencies typically promulgate permanent rules, an agency may temporarily adopt a rule as an emergency rule if the agency determines that the preservation of public peace, health, safety, or welfare necessitates placing a rule into effect prior to the time it could take effect as a permanent rule. As with permanent rules, the Legislature maintains an oversight role with respect to emergency rules, primarily through the statutory powers granted to JCRAR. This issue brief summarizes the emergency rulemaking process and the mechanisms for legislative oversight of emergency rules.

### PROMULGATION OF AN EMERGENCY RULE

While certain requirements that apply to permanent rules<sup>1</sup> also apply to emergency rules, the statutes provide a modified rulemaking process for emergency rules, which includes the following basic steps:

- **Preparation of Scope Statement.** The agency prepares a scope statement for the emergency rule, which must adhere to the same requirements as scope statements prepared for permanent rules. For an emergency rule, the agency must also include a finding of emergency, meaning that the preservation of public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect under the permanent rulemaking procedures.<sup>2</sup>
- **Gubernatorial Approval of Scope Statement.** The agency submits the scope statement to the Department of Administration (DOA). DOA must determine whether the agency has the explicit authority to promulgate the rule and report its determination, along with the scope statement, to the Governor for approval or rejection.<sup>3</sup>
- **Publication of Scope Statement.** If the Governor approves the scope statement, the agency sends an electronic copy of the scope statement to the Legislative Reference Bureau (LRB) for publication in the weekly Administrative Register.<sup>4</sup>
- **Agency Approval and 10-Day Waiting Period.** The agency also presents the scope statement to the individual or body with policy-making powers over the subject matter of the proposed rule for approval. Such approval is typically given by a secretary or board and may not be given until at least 10 days after publication of the scope statement in the Administrative Register.<sup>5</sup>
- **Preliminary Hearing and Comment Period.** Within 10 days after publication of the scope statement in the Administrative Register, either JCRAR co-chair may, in writing, direct the agency to hold a preliminary public hearing and comment period on the scope statement. An agency may also hold a preliminary hearing and comment period on its own accord.<sup>6</sup> If a preliminary hearing and comment period are held, the individual or body with policy-making powers may not approve the scope statement without receiving and reviewing public comments and feedback reported by the agency from the hearing.<sup>7</sup>
- **Drafting the Emergency Rule.** Upon the Governor and the individual or body with policy-making power approving the scope statement, the agency may draft the proposed emergency rule.<sup>8</sup>
- **Gubernatorial Approval of Emergency Rule.** The agency submits the final draft emergency rule to the Governor, who must provide written notice of approval.<sup>9</sup>

- **Publication of Emergency Rule.** Following gubernatorial approval, promulgation of an emergency rule occurs via publication in the official state newspaper and submission of the rule to the LRB. An emergency rule takes effect upon publication in the newspaper and remains in effect for 150 days, unless extended by JCRAR. The agency must prepare a plain language analysis to be printed with the rule when published.<sup>10</sup>
- **Post-Publication Requirements.** Following publication, the agency must: satisfy certain filings with the Legislature; if the emergency rule may have a significant economic impact on small businesses, submit the rule to the small business regulatory review board; and conduct a public hearing on the emergency rule within 45 days after promulgation, though extensions are permitted in certain circumstances.<sup>11</sup>

## LEGISLATIVE OVERSIGHT OF EMERGENCY RULES

Current law affords the Legislature a number of mechanisms to oversee existing rules, including emergency rules, including those identified below.

### Extension of Emergency Rules

An emergency rule is temporary in nature and is initially effective for a period of 150 days. At the request of an agency filed at least 30 days before the rule's expiration, JCRAR may grant an extension for up to an additional 60 days. The total period for all extensions granted may not exceed 120 days.<sup>12</sup>

### Public Hearings to Investigate Complaints

JCRAR must hold a public hearing to investigate any complaint with respect to a rule, if it considers the complaint meritorious and worthy of attention.<sup>13</sup>

### Suspension of Emergency Rules

JCRAR may suspend all or part of an emergency rule that has been promulgated and is in effect, if JCRAR has first received testimony about the rule at a public hearing and the suspension is based on one or more statutory reasons, such as: an absence of statutory authority; an emergency relating to public health, safety, or welfare; a failure to comply with legislative intent; or arbitrariness and capriciousness, or imposition of an undue hardship.<sup>14</sup>

If JCRAR suspends a rule or part of a rule, it must, within 30 days, introduce a bill in each house to repeal the suspended rule. If both bills are defeated or fail to be enacted in any other manner, the rule remains in effect. If either bill is enacted, the rule is repealed and may not be promulgated again by the agency unless a subsequent law specifically authorizes such action.<sup>15</sup>

<sup>1</sup> For a description of and flow chart summarizing the permanent rulemaking process, see Legislative Council, Wisconsin Legislator Briefing Book, [Chapter 4: Administrative Rulemaking](#) (November 2018).

<sup>2</sup> ss. 227.135 (1) and 227.24 (1) (a) and (e) 1d., Stats.

<sup>3</sup> ss. 227.135 (2) and 227.24 (1) (e) 1d., Stats.

<sup>4</sup> ss. 227.135 (3) and 227.24 (1) (e) 1d., Stats.

<sup>5</sup> ss. 227.135 (2) and 227.24 (1) (e) 1d., Stats.

<sup>6</sup> For any hearing and comment period conducted by the agency, whether conducted on its own accord or at the directive of a JCRAR co-chair, the agency must publish notice of the hearing and comment period in the Administrative Register, and may not hold the hearing sooner than the third day after publication. [s. 227.136 (2) and (3), Stats.]

<sup>7</sup> ss. 227.135 (2), 227.136, and 227.24 (1) (e) 1d., Stats.

<sup>8</sup> ss. 227.135 (2) and 227.24 (1) (e) 1d., Stats.

<sup>9</sup> s. 227.24 (1) (e) 1g., Stats.

<sup>10</sup> s. 227.24 (1) (c), (d), (e) 1m., and (2), Stats.

<sup>11</sup> s. 227.24 (1) (e) 2., (3), (3m), and (4), Stats.

<sup>12</sup> s. 227.24 (2), Stats.

<sup>13</sup> s. 227.26 (2) (c), Stats.

<sup>14</sup> s. 227.26 (2) (d), Stats.

<sup>15</sup> s. 227.26 (2) (f), Stats.