

Clearinghouse Rule 21-104

WISCONSIN DEPARTMENT OF CORRECTIONS PROPOSED RULE MAKING ORDER

INTRODUCTORY CLAUSE

The statement of scope for this rule was approved by the Governor on December 18, 2020, published as Scope Statement No. SS 005-21 in Register No. 781A2 on January 11, 2021, and approved by Secretary Kevin Carr on March 1, 2021.

The Wisconsin Department of Corrections proposes an order **to repeal** DOC 328.04(3)(e), 328.04(3)(j), 328.04(3)(k), and 328.04(3)(o) and **to amend** DOC 328.04(3)(d).

RULE SUMMARY

1. Statutes interpreted:

ss. 6.03, 165.76, 301.001, 301.03, 302.113(10), 302.114(10), 302.117, 939.615(5)(a), 973.01(5), 973.09(1), 973.10 Stats.

2. Statutory authority to promulgate the rule: Section 227.11 (2) (a) – (e): Rule-making authority is expressly conferred on an agency 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 non-statutory 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.

(b) Each agency may prescribe forms and procedures in connection with any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but this paragraph does not authorize the imposition of a substantive requirement in connection with a form or procedure.

(c) Each agency authorized to exercise discretion in deciding individual cases may formalize the general policies evolving from its decisions by promulgating the policies as rules which the agency shall follow until they are amended or repealed. A rule promulgated in accordance with this paragraph is valid only to the extent that the agency has discretion to base an individual decision on the policy expressed in the rule.

(d) An agency may promulgate rules implementing or interpreting a statute that it will enforce or administer

after publication of the statute but prior to the statute's effective date. A rule promulgated under this paragraph may not take effect prior to the effective date of the statute that it implements or interprets.

(e) An agency may not inform a member of the public in writing that a rule is or will be in effect unless the rule has been filed under s. 227.20 or unless the member of the public requests that information.

Section 301.03 (3): Administer parole, extended supervision, and probation matters, except that the decision to grant or deny parole to inmates shall be made by the parole commission and the decision to revoke probation, extended supervision, or parole, in cases in which there is no waiver of the right to a hearing, shall be made by the division of hearings and appeals in the department of administration. The secretary may grant special action parole releases under s. 304.02. The department shall promulgate rules to [effectuate short-term sanctions].

Section 301.03 (7m): Supervise criminal defendants accepted into the custody of the department under s. 969.02 (3) (a) or 969.03 (1) (a). The department shall charge the county that is prosecuting the defendant a fee for providing this supervision. The department shall set the fee by rule.

Section 302.113 (10): The department may promulgate rules establishing guidelines and criteria for the exercise of discretion under this section [release to extended supervision for felony offenders not serving life sentences].

Section 302.114 (10): The department may promulgate rules establishing guidelines and criteria for the exercise of discretion under this section [petition for release and release to extended supervision for felony offenders serving life sentences].

Section 302.19: Temporary detention of inmates: The department may use any of its facilities for the temporary detention of persons in its custody.

Section 302.31 (5) and (6): The county jail may be used for any of the following purposes:

....

(5) The detention of persons participating in the intensive sanctions program.

(6) The temporary detention of persons in the custody of the department.

Section 939.615 (5) (a): A person placed on lifetime supervision under this section [lifetime supervision of serious sex offenders] is subject to the control of the department under conditions set by the court and regulations established by the department that are necessary to protect the public and promote the rehabilitation of the person placed on lifetime supervision.

Section 973.01 (2) (intro): Structure of bifurcated sentences. A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113. The total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision. An order imposing a bifurcated sentence under this section shall comply with all of the following:

Section 973.10: Control and supervision of probationers. (1) Imposition of probation shall have the effect of placing the defendant in the custody of the department and shall subject the defendant to the control of the department under conditions set by the court and rules and regulations established by the department for the supervision of probationers, parolees and persons on extended supervision.

3. Explanation of agency authority: The department is directed by Wisconsin Statute § 301.03(3) to “administer parole, extended supervision, and probation matters.”

4. Related statute or rule: Wisconsin Statute § 301.03(3) and Wisconsin Administrative Code Chapter 331.

5. Plain language analysis: This rule:

- a. Amends Wis. Admin. Code § DOC 328.04(3)(d) to simplify the provision in an effort to increase offender compliance.
- b. Repeals Wis. Admin. Code § DOC 328.04(3)(e) to remove outdated or potentially onerous rule sections.
- c. Repeals Wis. Admin. Code § DOC 328.04(3)(j) to remove outdated or potentially onerous rule sections.
- d. Repeals Wis. Admin. Code § DOC 328.04(3)(k) to remove outdated or potentially onerous rule sections.
- e. Repeals Wis. Admin. Code § DOC 328.04(3)(o) to remove outdated or potentially onerous rule sections.

6. Summary of, and comparison with, existing or proposed federal regulations that are intended to address the activities to be regulated by the proposed rule: There are no existing or proposed federal regulations that address the activities to be regulated by the proposed rules.

7. Comparison with similar rules in adjacent states:

All adjacent states have standard rules of community supervision and the adjacent states generally have similar standard rules of community supervision to Wisconsin. Wisconsin's proposed standard rules of community supervision include avoiding conduct in violation of the law and conduct not in the best interest of the public welfare or the offender's rehabilitation, reporting arrests, cooperating with programming, submitting to searches, obtaining permission from an agent prior to changing residence, changing employment, traveling out of state or purchasing, possessing, owning or carrying certain items, paying court ordered fees, reporting to an agent and submitting a biological specimen for testing when ordered by a court.

a. **Illinois:** Illinois Statute provides conditions for every parole and mandatory supervised release. These conditions include: not violating any criminal statute of any jurisdiction, reporting all arrests to an agent no later than 24 hours after release for custody and immediately reporting service or notification of an order of protection, a civil no contact order, or a stalking no contact order, consenting to a search of his or her person, property, or residence under his or her control, obtaining permission of an agent before changing his or her residence or employment, obtaining permission of an agent before leaving Illinois, refraining from possessing a firearm or other dangerous weapon, reporting to an agent, providing true and accurate information as it relates to his or her adjustment in the community or to his or her conduct while incarcerated, and submitting to a urinalysis test as instructed by a parole agent. 730 ILCS 5/3-3-7(a).

There are additional conditions for every parole and mandatory supervised release relating to narcotics and other controlled substances, residence, and programming. There are several other conditions for every parole and mandatory supervised release if the subject has been convicted of certain offenses, such as sex offenses. 730 ILCS 5/3-3-7(a)-(b-1).

Illinois Statute also provides the conditions of probation and of conditional discharge. 730 ILCS 5/5-6-3. The conditions of probation and conditional discharge include: not violating any criminal statute of any jurisdiction, refraining from possessing a firearm or other dangerous weapon and not leaving the state without the consent of the court. 730 ILCS 5/5-6-3. There are several additional conditions of probation if the subject has been convicted of certain offenses, such as sex offenses. 730 ILCS 5/5-6-3.

b. **Iowa:** Iowa Administrative Code provides the standard conditions of parole. The standard conditions of parole include: not changing residence unless prior approval is received from the supervising judicial district director or director's designee, not leaving the county of residence unless prior permission to travel is received from the parolee's supervising judicial district director or director's designee, maintaining contact with the supervising officer, not lying to, misleading, or misinforming the parolee's supervising officer either by statement or omission of information, participating and cooperating with any treatment, rehabilitation, or monitoring programs, obeying all laws and ordinances, notifying a parole officer within 24 hours if the parolee is arrested or receives a citation or if the parolee has any contact with law enforcement, receiving approval by the supervising officer prior to owning, possessing, using, or transporting firearms, dangerous weapons, or imitations thereof, paying any fees ordered by the court, and notifying the supervising officer within 24 hours if the parolee's employment is terminated. 201 IAC 45.2(1). Additional special conditions may be imposed at any time. 201 IAC 45.2(2).

Per Iowa Administrative Code, the district department shall establish conditions of probation which meet the approval of the chief judge of the judicial district, which apply to each person under probation supervision. 201 IAC 42.1(12). Therefore, the standard conditions of probation vary between different judicial districts.

In the 6th Judicial District, the standard conditions of probation include: obeying all laws, notifying a probation officer of any contact with law enforcement officials within 24 hours, submitting a written report of activities monthly or as often as the probation officer requires, securing permission from the probation officer before changing address, securing permission from the probation officer before changing or quitting a job, consenting to searches by any probation officer having reasonable grounds to believe contraband is present, submitting to urinalysis or breathalyzer testing upon request of a probation officer or official designee, actively cooperating in any evaluations, treatments, rehabilitation or monitoring programs, securing written permission from the probation officer before traveling outside Iowa, paying restitution, court-appointed attorney fees, court costs, surcharge and fines as ordered by the Court, not lying to, misleading or misinforming the probation officer, and not possessing, using, or transporting a firearm or other dangerous weapon if convicted of certain offenses. 6th Judicial District Policy 0402A-17.

Additional standard conditions of probation in the 6th Judicial District include not using or possessing illegal drugs or drug paraphernalia, abstaining from or limiting the use of alcoholic beverages, treating all persons with respect and courtesy, and not operating a motor vehicle without a valid driver's license or permit. 6th Judicial District Policy 0402A-17.

c. **Michigan:** Per Michigan Administrative Code, each order of parole shall set the parole term and shall contain conditions of parole that are reasonably necessary to assist a parolee to lead a law-abiding life. Mich. Admin. Code R 791.7730(1). An order of parole includes the following conditions: payment of restitution, payment of a parole oversight fee and payment of any assessment. Mich. Admin. Code R 791.7730(3). Additional conditions may be included in the parole order and subsequent conditions may be added to the parole order upon approval by the chairperson of the parole board. Mich. Admin. Code R 791.7730(4).

Conditions of probation are set by the court that retains legal control over the probationer's status. Michigan Statute outlines the standard conditions of probation. These conditions include: not violating any criminal law of Michigan, the United States, or another state or any ordinance of any municipality, obtaining consent of the court before leaving the state, reporting to the probation officer monthly or as

often as the probation officer requires, and paying any supervision fee, restitution, assessment or other minimum state cost. MCL 771.3(1).

d. **Minnesota:** Minnesota Administrative Rule defines the standard conditions of parole or supervised release. The standard conditions of parole or supervised release include: keeping the supervising agent informed of residence and activities, notifying the supervising agent within 24 hours if arrested, submitting reports as required by the supervising agent, refraining from purchasing or otherwise obtaining or having possession of any type of firearm or dangerous weapon, obtaining the written permission of the supervising agent prior to leaving the state, and obeying Minnesota Statutes. Minn. Admin. Code 2940.2000(2)-(10).

Per Minnesota Statute, any court may stay imposition or execution of sentence and may place the defendant on probation with or without supervision and on the terms the court prescribes, including intermediate sanctions when practicable. Minn. Stat. 609.135(1)(a)(2). For certain types of offenses, there are standard conditions of probation. For example, for criminal sexual assault in the second degree, if the court stays imposition or execution of sentence, the court must include the following as conditions of probation: incarceration in a local jail or workhouse, a requirement that the offender complete a treatment program and a requirement that the offender have no unsupervised contact with the complainant. Minn. Stat. 609.343(3). Another example includes the standard conditions of probation for felony conviction. These standard conditions, set by Minnesota Judicial Council policy, include: following all state and federal criminal laws, contacting the probation officer as directed, notifying the probation officer within 72 hours if there is any contact with law enforcement, notifying the probation officer within 72 hours if there is a charge for another crime, notifying the probation officer within 72 hours if there is a change in address, employment, or telephone number, cooperating with searches by the probation officer, providing a DNA sample when directed, not possessing any firearms, ammunition, or explosives and not registering to vote until discharged from probation. Minnesota Judicial Branch Policy 522.

8. Summary of the factual data and analytical methodologies: The Department of Corrections has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in s. 227.114, Stats.

9. Analysis and supporting documents used to determine effect on small business or in preparation of economic impact analysis: Not applicable.

10. Effect on small businesses: Not applicable.

11. A copy of any comments and opinion prepared by the Board of Veterans Affairs. Not applicable.

12. Agency contact person: Caitlin Washburn, Administrative Rules Coordinator, 3099 East Washington Avenue, P.O. Box 7925, Madison, WI, 53707-7925; by phone: (608) 240-5020; or by email: DOCAdministrativeRulesCommittee@wisconsin.gov.

13. Place where comments are to be submitted and deadline for submission: Written comments on the proposed rule will be accepted and receive consideration if they are received by January 12th, 2021. Written comments should be addressed to: Administrative Rules Committee, c/o Caitlin Washburn, DOC, P.O. Box 7925, Madison, WI 53707-7925, or by email: DOCAdministrativeRulesCommittee@wisconsin.gov.

SECTION 1. DOC 328.04 (3) (d) is amended to read:

DOC 328.04 (3) (d) Make every effort to cooperate with and accept opportunities ~~and counseling offered by the department. This includes authorizing the exchange of information between the department and any court ordered or agent directed program and subsequent disclosure to any parties deemed necessary by the agent to achieve the purposes of this chapter and ch. DOC 331 for programming during supervision.~~

SECTION 2. DOC 328.04 (3) (e) is repealed.

SECTION 3. DOC 328.04 (3) (j) and (k) are repealed.

SECTION 4. DOC 328.04 (3) (o) is repealed.

SECTION 5. EFFECTIVE DATE. This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2) (intro.), Stats.