



2009 ASSEMBLY BILL 767

February 23, 2010 - Introduced by Representatives BARCA, DEXTER, STRACHOTA, BERNARD SCHABER, CLARK, ZIGMUNT, GARTHWAITE, HILGENBERG, SHILLING, JORGENSEN, STEINBRINK, KERKMAN, SMITH, SINICKI, HUBLER, BERCEAU and TURNER, cosponsored by Senators PLALE, WIRCH, DARLING, VINEHOUT, LASSA and TAYLOR. Referred to Committee on Jobs, the Economy and Small Business.

1 **AN ACT** *to renumber and amend* 560.03 (9); *to amend* 15.155 (5), 20.143 (1)
2 (kc), 227.114 (7m), 227.14 (2g) (intro.), 227.19 (3m), 227.24 (3m) (intro.), 285.79
3 (3) (intro.) and 560.11 (2); and *to create* 227.04, 560.038 (title) and (1) (intro.),
4 560.038 (1) (a), (b), (c), (d) and (e) and 560.038 (3) of the statutes; **relating to:**
5 changes to the membership of the Small Business Regulatory Review Board,
6 notification to the Small Business Regulatory Review Board of bills with an
7 economic impact on small businesses, and the role of the Office of the Small
8 Business Advocate in the Department of Commerce.

Analysis by the Legislative Reference Bureau

This bill makes the following changes to the membership of the Small Business Regulatory Review Board (board), the considerations to be made for small businesses by agencies engaging in administrative rule making, the responsibilities of small business regulatory coordinators in each agency, and the structure and functions of the small business ombudsman clearinghouse in the Department of Commerce (Commerce):

Small Business Regulatory Review Board

Currently, the membership of the board in Commerce consists of six representatives of small businesses, the chairpersons of the senate and assembly

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committees concerned with small businesses, and one representative each from the departments of Administration; Agriculture, Trade and Consumer Protection; Children and Families; Commerce; Health Services; Natural Resources; Regulation and Licensing; Revenue; and Workforce Development. Current law defines “small business” as a business entity, including its affiliates, which is independently owned and operated and not dominant in its field, and which employs 25 or fewer full-time employees or which has gross annual sales of less than \$5,000,000.

The board serves small businesses by reviewing administrative rules proposed by and emergency rules promulgated by agencies to determine the fiscal effect of the rules on small businesses. The board also reviews whether an agency has prepared an analysis for each proposed rule and emergency rule, sufficiently considered the effect of a proposed rule on small businesses, and complied with certain other procedural and substantive requirements as it prepared the proposed rule or emergency rule.

This bill eliminates from the board the representatives of all departments and increases the number of representatives of small businesses on the board to seven.

Rule making: considerations for small businesses

Under current law, each state agency must submit proposed administrative rules to the Legislative Council for review, prepare an analysis of the proposed rule, and, with certain exceptions, provide notice of and a public hearing regarding the proposed rule. If an agency determines that a proposed administrative rule may have a significant economic impact on small businesses, the agency must forward a copy of the proposed rule to the board.

Under current law, for each proposed rule that will have an effect on small businesses, an agency must prepare a final regulatory flexibility analysis that includes certain information, including a summary of issues raised by small businesses and any changes made to the proposed rule as a result of information and provided by small businesses. A final regulatory flexibility analysis is not required if the agency determines that the rule will not have a significant economic impact on a substantial number of small businesses.

Under certain circumstances, an agency may promulgate an emergency rule without complying with the notice and public hearing requirements. An agency must file a promulgated emergency rule with the Legislative Reference Bureau (LRB). If the emergency rule may have a significant economic impact on small businesses, the agency must submit a copy of the rule to the board on the same day it files the rule with the LRB.

With certain exceptions, a rule promulgated by an agency takes effect on the first day of the month commencing after the day on which the rule is promulgated. Generally, an emergency rule takes effect upon publication. A rule that has a significant economic impact on small businesses applies to small businesses no earlier than the first day of the third month beginning after the date of publication.

This bill requires an agency to forward a copy of a proposed administrative rule or an emergency rule to the board if the rule may have an economic impact on small businesses, and not just a significant economic impact. The bill directs the board to determine whether a proposed rule or emergency rule will have a significant

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economic impact on a substantial number of small businesses. If the board determines that a proposed rule or emergency rule will have a significant economic impact on a substantial number of small businesses, the board may submit suggested changes in the proposed rule to minimize the economic impact of the proposed rule or emergency rule, or may recommend that the proposed rule, but not the emergency rule, be withdrawn. A final regulatory flexibility analysis is not required under the bill if the board, and not the agency, determines that the rule will not have a significant economic impact on small businesses.

Administrative law: considerations for small business

This bill requires each agency, to the extent possible, to do all of the following:

1. Provide assistance to small businesses to help small businesses comply with rules promulgated by the agency.
2. Establish reduced fines and alternative enforcement mechanisms for minor violations of administrative rules by small businesses.
3. Consider the use of a written warning or alternative penalty against a small business found to be in violation of a rule if the small businesses made a good faith effort to comply with the rule and the rule does not pose a threat to public health, safety, or welfare or to the environment or the workplace.

Small business regulatory coordinators and the Office of the Small Business Advocate

Under current law, each agency must designate a small business regulatory coordinator to act as a point of contact within the agency for regulatory issues involving small businesses. Current law defines “agency” to mean a board, commission, committee, department, or officer in the state government, except the governor, a district attorney, or a military or judicial officer. Also under current law, Commerce must establish and operate a small business ombudsman clearinghouse to facilitate communication between state agencies and small businesses.

This bill changes the name of the ombudsman clearinghouse to the Office of the Small Business Advocate (office). The bill requires each agency to designate one employee to serve as the agency’s small business regulatory coordinator and clarifies that the small business regulatory coordinator of each agency must work with the office to facilitate communication between small businesses and state agencies.

The bill requires Commerce to model the office on the best practices of state and federal small business advocate organizations, to take a proactive role in maintaining and helping small businesses to grow, and to have the goal of creating jobs and a healthy small business sector. The bill also requires Commerce to designate at least one full-time employee to serve as staff to the office. The staff of the office must, in turn, serve as staff to the board and work together with the small business regulatory coordinator of each agency.

Also under the bill, the office must, upon the written request of a small business against which an agency has initiated an enforcement action, review and investigate the circumstances of the enforcement action and make recommendations regarding alternative enforcement to the enforcing agency. The office must annually report to the governor and to the legislature the role of the office in providing regulatory relief to and promoting regulatory compliance by small businesses.

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For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 15.155 (5) of the statutes is amended to read:

2 15.155 (5) SMALL BUSINESS REGULATORY REVIEW BOARD. There is created a small
3 business regulatory review board, attached to the department of commerce under s.
4 15.03. The board shall consist of ~~a representative of the department of~~
5 ~~administration; a representative of the department of agriculture, trade and~~
6 ~~consumer protection; a representative of the department of children and families; a~~
7 ~~representative of the department of commerce; a representative of the department~~
8 ~~of health services; a representative of the department of natural resources; a~~
9 ~~representative of the department of regulation and licensing; a representative of the~~
10 ~~department of revenue; a representative of the department of workforce~~
11 ~~development;~~ 6 7 representatives of small businesses, as defined in s. 227.114 (1),
12 who shall be appointed for 3-year terms; and the chairpersons of one senate and one
13 assembly committee concerned with small businesses, appointed as are members of
14 standing committees. ~~The representatives of the departments shall be selected by~~
15 ~~the secretary of that department.~~

16 **SECTION 2.** 20.143 (1) (kc) of the statutes is amended to read:

17 20.143 (1) (kc) *Clean air act compliance assistance.* From moneys transferred
18 from the appropriation account under s. 20.370 (2) (bg), the amounts in the schedule
19 for assisting the department of natural resources in administering the small
20 business stationary source technical and environmental compliance assistance
21 program under s. 285.79 and for expenses related to serving as ombudsman an

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1 advocate for small business stationary sources as required under s. 560.03 (9)
2 560.038 (2).

3 **SECTION 3.** 227.04 of the statutes is created to read:

4 **227.04 Considerations for small business. (1)** In this section, “small
5 business” has the meaning given in s. 227.114 (1).

6 **(2)** Consistent with the requirements under s. 895.59 and, to the extent
7 possible, each agency shall do all of the following:

8 (a) Provide assistance to small businesses to help small businesses comply with
9 rules promulgated by the agency.

10 (b) Establish, by rule, reduced fines and alternative enforcement mechanisms
11 for minor violations of administrative rules made by small businesses. The rules
12 promulgated under this subdivision shall include a definition of “minor violation.”

13 (c) In deciding whether to impose a fine against a small business found to be
14 in violation of a rule, consider the appropriateness of a written warning, reduced fine,
15 or alternative penalty if all of the following apply:

- 16 1. The small business has made a good faith effort to comply with the rule.
17 2. The rule violation does not pose a threat to public health, safety, or welfare,
18 or to the environment or the workplace.

19 **SECTION 4.** 227.114 (7m) of the statutes is amended to read:

20 227.114 **(7m)** ~~The~~ Each agency shall designate ~~a~~ at least one employee to serve
21 as the small business regulatory coordinator to for the agency, and shall publicize
22 that employee’s electronic mail address and telephone number. The small business
23 regulatory coordinator shall act as a contact person for small business regulatory
24 issues for the agency and shall ~~publicize that person’s electronic mail address and~~

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1 ~~telephone number~~ cooperate with the staff of the office of the small business advocate
2 under s. 560.038 to accomplish the objectives of this subsection and s. 560.038.

3 **SECTION 5.** 227.14 (2g) (intro.) of the statutes is amended to read:

4 227.14 (2g) REVIEW BY THE SMALL BUSINESS REGULATORY REVIEW BOARD. (intro.)

5 On the same day that an agency submits to the legislative council staff under s.
6 227.15 a proposed rule that may have ~~a significant~~ an economic impact on small
7 businesses, the agency shall submit the proposed rule, the analysis required under
8 sub. (2), and a description of its actions taken to comply with s. 227.114 (2) and (3)
9 to the small business regulatory review board. The board may use cost-benefit
10 analysis to determine the fiscal effect of the rule on small businesses and shall
11 determine whether the proposed rule will have a significant impact on a substantial
12 number of small businesses and whether the agency has complied with subs. (2) and
13 (2m) and s. 227.114 (2) and (3). Except as provided in subs. (1m) and (1s), each
14 proposed rule shall include provisions detailing how the rule will be enforced. If the
15 board determines that the rule does not include an enforcement provision or that the
16 agency failed to comply with sub. (2) or (2m) or s. 227.114 (2) or (3), the board shall
17 notify the agency of that determination and ask the agency to comply with any of
18 those requirements. If the board determines that the proposed rule will have a
19 significant economic impact on a substantial number of small businesses, the board
20 may submit to the agency suggested changes in the proposed rule to minimize the
21 economic impact of the proposed rule, or may recommend the withdrawal of the
22 proposed rule under sub. (6). In addition, the board may submit other suggested
23 changes in the proposed rule to the agency, including proposals to reduce the use of
24 cross-references in the rule. The board shall send a report of ~~those suggestions~~ any
25 suggested changes and of any notice of failure to include enforcement provisions or

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1 to comply with sub. (2) or (2m) or s. 227.114 (2) or (3) to the legislative council staff.
2 The notification to the agency may include a request that the agency do any of the
3 following:

4 **SECTION 6.** 227.19 (3m) of the statutes is amended to read:

5 227.19 (3m) ANALYSIS NOT REQUIRED. The final regulatory flexibility analysis
6 specified under sub. (3) (e) is not required for any rule if the agency, ~~after complying~~
7 ~~with s. 227.114 (1) to (5),~~ board determines that the rule will not have a significant
8 economic impact on a substantial number of small businesses.

9 **SECTION 7.** 227.24 (3m) (intro.) of the statutes is amended to read:

10 227.24 (3m) REVIEW BY THE SMALL BUSINESS REGULATORY REVIEW BOARD. (intro.)
11 On the same day that the agency files a rule under sub. (3) that may have ~~a~~
12 ~~significant~~ an economic impact on small businesses, as defined in s. 227.114 (1), the
13 agency shall submit a copy of the rule to the small business regulatory review board.
14 The board may use cost-benefit analysis to determine the fiscal effect of the
15 emergency rule on small businesses and shall determine whether the emergency
16 rule will have a significant economic impact on a substantial number of small
17 businesses and whether the agency complied with ss. 227.114 (2) and (3) and 227.14
18 (2m). If the board determines that the emergency rule will have a significant
19 economic impact on a substantial number of small businesses, the board may submit
20 to the agency and to the legislative council staff suggested changes in the emergency
21 rule to minimize the economic impact of the emergency rule. If the board determines
22 that the agency failed to comply with s. 227.114 (2) or (3) or 227.14 (2m), the board
23 shall notify the agency of that determination and ask the agency to comply with any
24 of those provisions. In addition, the board may submit other suggested changes in

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1 the proposed rule to the agency and may include a request that the agency do any
2 of the following:

3 **SECTION 8.** 285.79 (3) (intro.) of the statutes is amended to read:

4 285.79 (3) ASSISTANCE PROGRAM. (intro.) The department shall, in cooperation
5 with the office of the small business ombudsman-clearinghouse advocate under s.
6 ~~560.03 (9)~~ 560.038, develop and administer a small business stationary source
7 technical and environmental compliance assistance program. The program shall
8 include all of the following:

9 **SECTION 9.** 560.03 (9) of the statutes is renumbered 560.038 (2) and amended
10 to read:

11 560.038 (2) ~~Establish~~ The department shall establish and operate a small
12 business ombudsman-clearinghouse for business and industry the office to facilitate
13 the flow of information ~~from~~ between other state and federal agencies and business
14 and industry, to assist state agencies in establishing methods to encourage the
15 participation of small businesses in rule making under s. 227.114 (4), and to serve
16 as ombudsman for small business stationary sources, ~~as defined in s. 285.79 (1), in~~
17 connection with the implementation of the federal clean air act, 42 USC 7401 to
18 7671q. The office shall be modeled on the best practices of both state and federal
19 small business advocate organizations, shall take a proactive role in maintaining
20 and helping small businesses grow economically, and shall have the goal of creating
21 jobs and a healthy small business sector. The office shall be staffed by at least one
22 full-time employee of the department. The staff of the office shall serve as staff to
23 the small business regulatory review board and shall cooperate with the small
24 business regulatory coordinator designated by each agency under s. 227.114 (7m) to
25 accomplish the objectives of this section, as appropriate.

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1 **SECTION 10.** 560.038 (title) and (1) (intro.) of the statutes are created to read:

2 **560.038 (title) Office of the small business advocate. (1)** (intro.) In this
3 section:

4 **SECTION 11.** 560.038 (1) (a), (b), (c), (d) and (e) of the statutes are created to read:

5 560.038 **(1)** (a) “Agency” has the meaning given in s. 227.01 (1).

6 (b) “Office” means the office of the small business advocate.

7 (c) “Small business” has the meaning given in s. 227.114 (1).

8 (d) “Small business regulatory coordinator” means the employee of an agency
9 designated by the agency as required under s. 227.114 (7m).

10 (e) “Small business stationary sources” has the meaning given in s. 285.79 (1).

11 **SECTION 12.** 560.038 (3) of the statutes is created to read:

12 560.038 **(3)** The office shall do all of the following:

13 (a) Upon the written request of a small business against which an agency has
14 initiated an enforcement action that may, in the opinion of the small business, cause
15 unnecessary hardship to the small business, review and investigate the
16 circumstances of the enforcement action and prepare recommendations regarding
17 alternative penalties to be imposed upon the small business that will, in the opinion
18 of the office, achieve regulatory compliance by the small business.

19 (b) Submit to the small business regulatory coordinator of the agency initiating
20 the enforcement action under par. (a) all of the following:

21 1. A copy of the written request submitted to the office under par. (a).

22 2. Any recommendations prepared by the office under par. (a).

23 3. A statement requesting that the small business regulatory coordinator
24 submit to the office within 45 days after receipt of the statement a written response
25 describing the enforcement action taken by the agency against the small business

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1 and whether any considerations were made for the small business as a result of the
2 recommendations made under subd. 2.

3 (c) Annually do all of the following:

4 1. Compile the written requests received by the office under par. (a), the
5 submissions made by the office under par. (b), and any communications received
6 from enforcing agencies under par. (b).

7 2. Analyze and evaluate the information under subd. 1. and any other relevant
8 information to determine regulatory enforcement trends and the efficacy of the office
9 in providing regulatory relief to and promoting regulatory compliance by small
10 businesses.

11 3. Report the information and findings under subds. 1. and 2. to the governor
12 and to the legislature under s. 13.172 (2).

13 **SECTION 13.** 560.11 (2) of the statutes is amended to read:

14 560.11 (2) The employees of the department of commerce who staff the office
15 of the small business ombudsman-clearinghouse advocate under s. 560.03 (9)
16 560.038 and the employees of the department of natural resources who staff the
17 small business stationary source technical and environmental compliance
18 assistance program under s. 285.79 shall provide the small business environmental
19 council with the assistance necessary to comply with sub. (1).

20 **SECTION 14. Initial applicability.**

21 (1) The treatment of section 227.14 (2g) (intro.) of the statutes first applies to
22 a proposed administrative rule submitted by an agency to the legislative council staff
23 under section 227.15 of the statutes on the effective date of this subsection.

