



Wisconsin Legislative Council

Administrative Rule Making

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Pam Shannon & Scott Grosz
Senior Staff Attorneys

Rule Promulgation Process

- Statutory Process, primarily in subch. II of Ch. 227, Stats.
- Major Changes to Process under 2011 Wisconsin Act 21 (“Act 21”)
- Changes and Clarifications in 2011 Wisconsin Act 32 (“Budget Act”)
- Legislative Review of Existing Rules



Definition of “Rule”

- Section 227.01 (13) (intro.), Stats.
 - Generally, “rule” means a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.
 - Exemptions: Over 50 specific actions or inactions are exempt from rule making. Certain new exemptions created by Act 32.



Agency Rule Making Responsibility

- Section 227.10 (1), Stats.
 - “Each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.”



Agency Rule Making Responsibility as Modified by Act 21

- Section 227.10 (2m), Stats., created by Act 21, qualifies the general statement in sub. (1) by providing:

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 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.



Agency Rule Making Authority

- Section 227.11 (2) (a) (intro.), Stats.
- An agency may promulgate rules interpreting the provisions of any statute it enforces or administers.
- Rules must be considered necessary to effectuate the purpose of the statute.
- Rules may not exceed the bounds of correct interpretation.
- Act 21 places a number of constraints on agency rule making authority.



Modifications to Rule Making Authority under Act 21

- Section 227.11 (2) (a) (intro.) and 1. to 3., Stats.
- No rule making authority from:
 - Statements of legislative intent, purpose, findings or policy.
 - An agency's general duties or powers, beyond the rule-making authority that is explicitly conferred on the agency by the Legislature.
- Specific standards, thresholds, and requirements do not confer authority for more restrictive standards, thresholds or requirements.



Rule Promulgation Process, as Modified by Act 21

- In addition to making changes to agency rule making authority, Act 21 made changes to the process by which agencies promulgate rules.
- The changes begin with the earliest stage in the process: drafting of scope statements.



Scope Statements

[s. 227.135, Stats.]

- Preparation of a scope statement is required prior to performance of activities in connection with drafting the proposed rule.
- Act 21: scope statements for both permanent and emergency rules must be approved by the Governor prior to publication. Passive review of scope statements deleted.



Economic Impact Reports under Prior Law

- DATCP, Commerce, DNR, DOT, & DWD.
- Timely petition to DOA by municipality, trade association, or affected citizens.
- DOA must request a report if rule would cost \$20 million during each of the 5 years after implementation or cause other adverse effects.
- DOA review following report preparation.



Economic Impact Analyses under Act 21

- Section 227.137, Stats.
- All agencies to complete economic impact analysis before Leg. Council review.
- DOA report required upon expectation of a total of \$20 million in implementation and compliance costs to businesses, local governments or individuals.
- If required, DOA report and approval must be obtained prior to agency submission of rule to Legislature.



Economic Impact Analyses under Act 21

- Analysis and quantification of policy problem, economic impact, and effectiveness.
- Comparison to approaches used by federal government and neighboring states.
- Prepared in coordination with local governmental units that may be affected.
- An economic impact analysis is not required for an emergency rule.



Legislative Council Staff Review [s. 227.15, Stats.]

- Leg. Council serves as Administrative Rules Clearinghouse.
- Prior to agency public hearing.
- 20 working days for Clearinghouse review.
- Leg. Council and LRB Joint Publication:
Administrative Rules Procedure Manual.



Leg. Council Staff Review

- Subject Matter of LC review:
 - Statutory authority.
 - Form, style, and placement in Adm. Code.
 - Conflict or duplication with existing rules.
 - Adequate references to related material.
 - Clarity, grammar, and punctuation.
 - Conflicts with related federal regulations.
 - Number of business days for permit approval.



Agency Rule Making Hearings

[s. 227.16, Stats.]

- General rule: rule making must be preceded by notice and public hearing.
- Exceptions:
 - Rules to bring existing rules into conformity with a statute or judicial opinion.
 - Emergency rules.
 - Upon direction of JCRAR to promulgate policy as emergency rules.
 - Publication in the Adm. Register unless petitioned for a hearing (30-day rule).



Act 21: Gubernatorial Review

[s. 227.185, Stats.]

- Gubernatorial approval of final draft required in writing prior to submission to the Legislature for standing committee review of proposed rules.
- Governor may approve or reject proposed rules.
- Governor must also approve an emergency rule in writing before it can be submitted to the LRB for publication.



Legislative Review of Proposed Rules

- Section 227.19, Stats.
- Notification to chief clerk of each house.
- Report to the Legislature:
 - Conclusions and recommendations of agency that demonstrate need for the proposed rule and its reasonableness.
 - Response to Leg. Council comments.
 - Response to public hearing comments.
- Referral to standing committees.



Standing Committee Review

[s. 227.19 (4), Stats.]

- 30-day passive review.
- May be extended for an additional 30 days if:
 - Committee Chair requests meeting with agency.
 - Committee Chair publishes notice of meeting to review rule.
- Act 21: modifications to end-of-session referrals.



Standing Committee Options

- Allow review period to expire or waive review period.
- Request modifications (agency may also submit its own germane modifications).
- Object to all or part of a proposed rule.



Joint Committee for Review of Administrative Rules (JCRAR)

- Section 227.19 (5), Stats.
- Act 21: referral to JCRAR
 - 30-Day passive review following standing committee inaction.
 - Mandatory review following standing committee objection.
 - Extensions of review period available.
- JCRAR may request modifications in same manner as standing committees.



Act 21: JCRAR Actions

- Agency may promulgate a rule if JCRAR:
 - Concurs in committee approval.
 - Non-concurs in committee objection.
 - Otherwise approves the rule.
 - Waives jurisdiction.
 - Review period expires without objection.



Act 21: JCRAR Objections

- Reasons for JCRAR objection:
 - Absence of statutory authority.
 - Emergency related to public health, safety or welfare.
 - Failure to comply with legislative intent.
 - Contrary to state law.
 - Change in circumstances since passage of law upon which rule is based.
 - Rule is arbitrary, capricious, or imposes undue hardship.
- If JCRAR objects to a rule, it must introduce supporting legislation within 30 days of the objection.



Bills in Support of JCRAR Objection

- If JCRAR objects to a rule, it must introduce supporting legislation within 30 days of the objection.
- 30 days for standing committee review of bills.
- Placement on legislative calendars within 40 days of referral to standing committees.
- Timely vs. “late” introduction of JCRAR bills.



Bills in Support of JCRAR Objection

- **Timely introduction:**
 - If bills are defeated or fail to be enacted, rule may be promulgated.
 - If bill is enacted, agency may not promulgate rule unless authorized by subsequent legislation.
- **Late introduction:**
 - Bills introduced in next legislative session; similar potential outcomes.



Act 21: Emergency Rules

[s. 227.24, Stats.]

- Gubernatorial approval of scope statements for emergency rules.
- Gubernatorial approval, in writing, of final draft of emergency rules prior to publication.
- Economic impact analyses not required for emergency rules.



Budget Act: Changes to Rule Making Process

- Technical clarification of gubernatorial approval process for emergency rules.
- Specific instructions for rule making regarding rules that increase dwelling construction costs.
- Various examples of other specified treatments for certain rules and other agency policies.



Legislative Review of Current Administrative Rules

- JCRAR may suspend a current rule at any time following promulgation, after receiving testimony at a public hearing.
- Must cite same reasons used to object to a rule.
- Section 227.26, Stats.



Bills in Support of JCRAR Suspension

- If JCRAR objects to a rule, it must introduce supporting legislation within 30 days of the objection.
- 30 days for standing committee review of bills.
- Placement on legislative calendars within 40 days of referral to standing committees.
- Timely vs. “late” introduction of JCRAR bills.



Bills in Support of JCRAR Suspension

- **Timely introduction:**
 - If bills are defeated or fail to be enacted, rule suspension is lifted. JCRAR may not suspend again.
 - If bill is enacted, the rule is repealed; agency may not re-promulgate rule unless authorized by subsequent legislation.
- **Late introduction:**
 - bills introduced in next legislative session; similar potential outcomes.



Additional JCRAR Activities

- JCRAR may direct agencies to promulgate statements of policy and interpretations of statutes as emergency rules.
 - Allows JCRAR to then suspend emergency rule upon promulgation if it wishes to nullify the agency statement or interpretation.
- JCRAR may extend the lifespan of an emergency rule in response to an agency request.

