



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-4507/2
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2017 BILL

1 **AN ACT to amend** 227.01 (13) (intro.), subchapter II (title) of chapter 227
2 [precedes 227.10], 227.11 (title), 227.53 (1) (intro.) and 227.57 (11); and **to**
3 **create** 35.93 (2) (b) 3. im., 227.01 (3m), 227.10 (2g), 227.11 (3) and 227.112 of
4 the statutes; **relating to:** deference by courts to agency interpretations of law,
5 notice and comment requirements for guidance documents issued by agencies,
6 and agency rule-making authority.

Analysis by the Legislative Reference Bureau

This bill 1) prohibits a court from according deference to agency interpretations of law in certain proceedings and prohibits agencies from seeking deference in any proceeding to agency interpretations of law; 2) establishes various requirements with respect to the adoption and use of guidance documents by agencies, including requirements that agencies must comply with in order to adopt guidance documents; and 3) provides that settlement agreements do not confer rule-making authority.

Agency interpretations of law

Generally under current law, when reviewing an agency decision in a contested case or other matter subject to judicial review under the law governing administrative procedure for state agencies, a court must accord due weight to the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The bill limits this directive

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such that a court performing judicial review of such a decision must accord no deference to an agency's interpretation of law.

The bill also provides that no agency may seek deference in any proceeding based on the agency's interpretation of any law.

Guidance documents

Subject to various exceptions, the bill defines "guidance document" as any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that 1) explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency; or 2) provides guidance or advice with respect to how the agency is likely to apply any statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

The bill requires each agency, no less than 21 days before adopting a guidance document, to post the proposed guidance document on the agency's Internet site and submit it to the Legislative Reference Bureau for publication in the register and to provide a period for persons to submit written comments to the agency on the proposed guidance document. The agency must retain all written comments submitted during the public comment period and consider those comments in determining whether to adopt the guidance document as originally proposed, modify the proposed guidance document, or take any other action. The bill allows for a comment period of less than 21 days with the approval of the governor. The bill also requires each adopted guidance document, while valid, to remain available on the agency's Internet site and requires the agency to permit continuing public comment on the guidance document. Each guidance document must be signed by the head of the agency below a statement containing certain certifications.

The bill provides that a guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any license. An agency that proposes to rely on a guidance document to the detriment of a person in any proceeding must afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the guidance document, and an agency may not use a guidance document to foreclose consideration of any issue raised in the guidance document. The bill also contains other provisions with respect to agency use of and reliance upon guidance documents, and allows certain persons to petition an agency to promulgate a rule in place of a guidance document.

The bill also provides that any action or inaction by an agency related to the requirements of the bill regarding guidance documents constitutes a decision subject to judicial review under the law governing administrative procedure for state agencies.

The bill provides that on July 1, 2018, any guidance document that does not comply with the requirements in the bill is considered to be rescinded.

Agency rule-making authority; settlement agreements

The bill provides that a settlement agreement, consent decree, or court order does not confer rule-making authority and cannot be used by an agency as authority

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to promulgate rules. The bill provides that no agency may agree to promulgate a rule as a term in any settlement agreement, consent decree, or stipulated order of a court unless the agency has explicit statutory authority to promulgate the rule at the time the settlement agreement, consent decree, or stipulated order of a court is executed.

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.** 35.93 (2) (b) 3. im. of the statutes is created to read:
2 35.93 (2) (b) 3. im. Notices of public comment periods on proposed guidance
3 documents under s. 227.112 (1) (a).

4 **SECTION 2.** 227.01 (3m) of the statutes is created to read:
5 227.01 (3m) (a) “Guidance document” means, except as provided in par. (b), any
6 formal or official document or communication issued by an agency, including a
7 manual, handbook, directive, or informational bulletin, that does any of the
8 following:

9 1. Explains the agency’s implementation of a statute or rule enforced or
10 administered by the agency, including the current or proposed operating procedure
11 of the agency.

12 2. Provides guidance or advice with respect to how the agency is likely to apply
13 a statute or rule enforced or administered by the agency, if that guidance or advice
14 is likely to apply to a class of persons similarly affected.

15 (b) “Guidance document” does not include any of the following:

16 1. A rule that has been promulgated and that is currently in effect or a proposed
17 rule that is in the process of being promulgated.

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1 2. A standard adopted, or a statement of policy or interpretation made, whether
2 preliminary or final, in the decision of a contested case, in a private letter ruling
3 under s. 73.035, or in an agency decision upon or disposition of a particular matter
4 as applied to a specific set of facts.

5 3. Any document or activity described in sub. (13) (a) to (zz), except that
6 “guidance document” includes a pamphlet or other explanatory material described
7 under sub. (13) (r) that otherwise satisfies the definition of “guidance document”
8 under par. (a).

9 4. Any document that any statute specifically provides is not required to be
10 promulgated as a rule.

11 5. A declaratory ruling issued under s. 227.41.

12 6. A pleading or brief filed in court by the state, an agency, or an agency official.

13 7. A letter or written legal advice of the department of justice or a formal or
14 informal opinion of the attorney general, including an opinion issued under s.
15 165.015 (1).

16 8. Any document or communication for which a procedure for public input,
17 other than that provided under s. 227.112 (1), is provided by law.

18 9. Any document or communication that is not subject to the right of inspection
19 and copying under s. 19.35 (1).

20 **SECTION 3.** 227.01 (13) (intro.) of the statutes is amended to read:

21 227.01 (13) (intro.) “Rule” means a regulation, standard, statement of policy,
22 or general order of general application ~~which~~ that has the effect force of law and
23 ~~which~~ that is issued by an agency to implement, interpret, or make specific
24 legislation enforced or administered by the agency or to govern the organization or
25 procedure of the agency. “Rule” includes a modification of a rule under s. 227.265.

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1 “Rule” does not include, and s. 227.10 does not apply to, any action or inaction of an
2 agency, whether it would otherwise meet the definition under this subsection, ~~which~~
3 that:

4 **SECTION 4.** Subchapter II (title) of chapter 227 [precedes 227.10] of the statutes
5 is amended to read:

CHAPTER 227

SUBCHAPTER II

ADMINISTRATIVE RULES ANDGUIDANCE DOCUMENTS

10 **SECTION 5.** 227.10 (2g) of the statutes is created to read:

11 227.10 (2g) No agency may seek deference in any proceeding based on the
12 agency’s interpretation of any law.

13 **SECTION 6.** 227.11 (title) of the statutes is amended to read:

14 **227.11** (title) ~~Extent to which chapter confers~~ **Agency rule-making**
15 **authority.**

16 **SECTION 7.** 227.11 (3) of the statutes is created to read:

17 227.11 (3) A settlement agreement, consent decree, or court order does not
18 confer rule-making authority and cannot be used by an agency as authority to
19 promulgate rules. No agency may agree to promulgate a rule as a term in any
20 settlement agreement, consent decree, or stipulated order of a court unless the
21 agency has explicit statutory authority to promulgate the rule at the time the
22 settlement agreement, consent decree, or stipulated order of a court is executed.

23 **SECTION 8.** 227.112 of the statutes is created to read:

24 **227.112 Guidance documents. (1)** (a) Except as provided in par. (c), no less
25 than 21 days before adopting a guidance document, an agency shall post the proposed

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1 guidance document on the agency's Internet site and, on the same date, submit a
2 notice of the public comment period on the proposed guidance document under par.
3 (b), including the Web address of the agency's Internet site at which comments may
4 be submitted, to the legislative reference bureau, in a format approved by the
5 legislative reference bureau, for publication in the register. The notice need not be
6 published in the register on the same day the agency posts the proposed guidance
7 document on its Internet site.

8 (b) The agency shall provide for a period for public comment on a proposed
9 guidance document posted under par. (a), during which any person may submit
10 written comments to the agency with respect to the proposed guidance document.
11 Except as provided in par. (c), the period for public comment shall end no sooner than
12 the 21st day after the date on which the proposed guidance document is posted on
13 the agency's Internet site.

14 (c) An agency may post a proposed guidance document less than 21 days before
15 adopting the proposed guidance document and with a public comment period shorter
16 than 21 days with the approval of the governor.

17 (d) An agency shall retain all written comments submitted during the public
18 comment period under par. (b) and shall consider those comments in determining
19 whether to adopt the guidance document as originally proposed, modify the proposed
20 guidance document, or take any other action.

21 **(2)** An agency shall post each guidance document that the agency has adopted
22 on the agency's Internet site and shall permit continuing public comment on the
23 guidance document. The agency shall ensure that each guidance document that the
24 agency has adopted remains on the agency's Internet site as provided in this
25 subsection until the guidance document is no longer in effect, is no longer valid, or

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1 is superseded or until the agency otherwise rescinds its adoption of the guidance
2 document.

3 (3) A guidance document does not have the force of law and does not provide
4 the authority for implementing or enforcing a standard, requirement, or threshold,
5 including as a term or condition of any license. An agency that proposes to rely on
6 a guidance document to the detriment of a person in any proceeding shall afford the
7 person an adequate opportunity to contest the legality or wisdom of a position taken
8 in the guidance document. An agency may not use a guidance document to foreclose
9 consideration of any issue raised in the guidance document.

10 (4) If an agency proposes to act in any proceeding at variance with a position
11 expressed in a guidance document, it shall provide a reasonable explanation for the
12 variance. If an affected person in any proceeding may have relied reasonably on the
13 agency's position, the explanation must include a reasonable justification for the
14 agency's conclusion that the need for the variance outweighs the affected person's
15 reliance interest.

16 (5) Persons that qualify under s. 227.12 to petition an agency to promulgate
17 a rule may, as provided in s. 227.12, petition an agency to promulgate a rule in place
18 of a guidance document.

19 (6) Any action or inaction by an agency related to the requirements of this
20 section constitutes a decision subject to judicial review under s. 227.53.

21 (7) Any guidance document shall be signed by the secretary or head of the
22 agency below the following certification: "I have reviewed this guidance document
23 or proposed guidance document and I certify that it complies with sections 227.10
24 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document
25 or proposed guidance document contains no standard, requirement, or threshold

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1 that is not explicitly required or explicitly permitted by a statute or a rule that has
2 been lawfully promulgated. I further certify that the guidance document or proposed
3 guidance document contains no standard, requirement, or threshold that is more
4 restrictive than a standard, requirement, or threshold contained in the Wisconsin
5 Statutes.”

6 (8) This section does not apply to guidance documents adopted before the
7 effective date of this subsection ... [LRB inserts date], but on July 1, 2018, any
8 guidance document that has not been adopted in accordance with sub. (1) or that does
9 not contain the certification required under sub. (7) shall be considered rescinded.

10 **SECTION 9.** 227.53 (1) (intro.) of the statutes is amended to read:

11 227.53 (1) (intro.) Except as otherwise specifically provided by law, any person
12 aggrieved by a decision specified in s. 227.112 or 227.52 shall be entitled to judicial
13 review of the decision as provided in this chapter and subject to all of the following
14 procedural requirements:

15 **SECTION 10.** 227.57 (11) of the statutes is amended to read:

16 227.57 (11) Upon review of an agency action or decision ~~affecting a property~~
17 ~~owner's use of the property owner's property~~, the court shall accord no deference to
18 the agency's interpretation of law ~~if the agency action or decision restricts the~~
19 ~~property owner's free use of the property owner's property.~~

20 (END)