



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Scott Grosz
Clearinghouse Director

Terry C. Anderson
Legislative Council Director

Margit Kelley
Clearinghouse Assistant Director

Jessica Karls-Ruplinger
Legislative Council Deputy Director

CLEARINGHOUSE RULE 18-038

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated December 2014.]

1. Statutory Authority

As the term is defined in s. 227.26 (4), Stats., the proposed rule does not appear to meet the standard that is required to submit a petition for the expedited repeal of an unauthorized rule. An “unauthorized rule” is a rule for which an agency lacks the authority to promulgate the rule due to the repeal or amendment of the law that previously authorized its promulgation.

In this case, the Department of Health Services (DHS) is proposing to repeal portions of two of its rules, ss. DHS 152.02 (25) and 153.02 (17), which incorporate by reference a former Department of Workforce Development (DWD) rule, s. DWD 11.15. The DWD rule was repealed in 2002 due to a change in that chapter’s rulemaking authority. However, because neither that former chapter nor its authorizing statute is the law that authorized chs. DHS 152 and 153, the DWD repeal does not make the DHS rules “unauthorized”, as that term is defined in s. 227.26 (4), Stats. The department does not reference any changes to its statutory authority to promulgate chs. DHS 152 and 153, and it appears that no such changes have been made by the Legislature.

In fact, even though the DWD rule no longer exists, the department proposes to continue to define the term “resident” for purposes of chs. DHS 152 and 153, suggesting that the changes proposed by the department in its petition are not driven by a change in agency authority. The proposed rule appears instead to be a “clean up” of an obsolete cross-reference, approval of which would represent an expansion in the nature of an unauthorized rule petition in comparison to those previously approved by the Joint Committee for Review of Administrative Rules.

2. Form, Style and Placement in Administrative Code

a. An introductory clause should be inserted to specifically enumerate the rule provisions treated and to state the subject matter of the proposed rule. [s. 1.02 (1), Manual.]

b. The rule summary's listing of statutes interpreted should be revised to cite the specific statutory provision that was interpreted for administration and enforcement in the department's original rule: ss. 49.68, 49.685, and 49.687, Stats. [s. 1.02 (2m) (a) and (b), Manual.]

c. The rule summary's listing of statutory authority should be revised to cite the specific statutory provision that granted rulemaking authority for the original rule: ss. 49.68 (2) and 49.685 (8) (c), Stats. The statutory provision for the expedited rulemaking process, s. 227.26 (4), Stats., should not be cited, as that provision establishes the process and does not remove or confer rulemaking authority for the subject matter addressed in the proposed rule. [s. 1.02 (2m) (a), Manual.]

d. The rule summary's explanation of agency authority should be updated to reflect any revisions made in accordance with the previous comment.

e. The rule summary's listing of related statutes or rules should be revised to identify any statutes or rules that relate to the subject matter addressed in the proposed rule.