

Clearinghouse Rule 08-072

**PROPOSED ORDER OF THE STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION
ADOPTING RULES**

The Wisconsin Department of Transportation proposes an order to create TRANS 117.03(2)(n), relating to the occupational licensing program.

NOTICE IS HEREBY GIVEN that pursuant to ss. 227.11(2)(a), 343.02(1), 343.10, 343.20 and 351.07, Stats., and interpreting ss. 227.11(2)(a), 343.10, 343.20 and 351.07, Stats., the Department of Transportation will hold a public hearing in **Room 144-B** of the Hill Farms State Transportation Building, 4802 Sheboygan Avenue, Madison, Wisconsin on the **15th** day of **August**, 2008, at **10:30 AM**, to consider the amendment of ch. Trans 117, Wisconsin Administrative Code, relating to the occupational licensing program.

An interpreter for the hearing impaired will be available on request for this hearing. Please make reservations for a hearing interpreter at least 10 days prior to the hearing.

Parking for persons with disabilities and an accessible entrance are available.

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Analysis Prepared by the Wisconsin Department of Transportation

Statutes interpreted: ss. 227.11(2)(a), 343.10, 343.20 and 351.07, Stats.

Statutory authority: ss. 227.11(2)(a), 343.02(1), 343.10, 343.20 and 351.07, Stats.

Explanation of agency authority: DMV is statutorily charged with responsibility for administering the state's driver licensing system. This rule making is related to the issuance of restricted ("occupational") driver licenses to drivers whose operating privileges are suspended or revoked.

Related statute or rule: ss. 49.857(3)(a)3., 343.30, 343.305, 343.31, 343.32, 346.63, 351.07, 767.73(1)(b), 938.34(14q) and 961.50, Stats.

Plain language analysis: This amendment codifies DMV's longstanding administrative practices related to statutorily required waiting periods following the revocation or suspension of operating privileges.

A recent Waukesha County case involving a repeat drunk driver who sought an occupational license during the minimum mandatory waiting period for a license specified in s. 343.30(1q)(a)4., Stats., made the Department aware of the fact that the current administrative rule does not discuss statutory minimum waiting periods for licensing. The proceeding illustrated a need to explain the Department's procedures with regard to application of the minimum waits for occupational licensing in the administrative rule.

Counsel from the Department of Justice recommended codifying this interpretation with other occupational licensing regulations.

What Are Occupational License Waiting Periods? Generally, drivers whose licenses are suspended or revoked can apply to DOT for a restricted license ("occupational license") that permits limited operation of a motor vehicle for up to 12 hours per day, not to exceed 60 hours per week. The licenses specify the area in which the driver may operate motor vehicles, the times at which they may drive, the purpose for which they may drive, such as work or homemaker duties.

Each revocation or suspension imposed by the Department or a court has an occupational license waiting period associated with it. By default, s. 343.10(2)(a)4., Stats., provides that a person must wait 15 days from the beginning of the revocation period before becoming eligible for an occupational license. But, where a different provision of law provides for a different shorter or longer waiting period, that period applies in lieu of the 15-day default. s. 343.10(2)(a)4., Stats. For example, persons whose licenses are suspended under the administrative suspension law do not have to wait at all. s. 343.305(8)(d), Stats. Persons who refuse chemical testing must wait 30, 90, or 120 days depending on the number of prior alcohol offenses the person committed prior to the refusal. Federal law essentially requires Wisconsin to impose one-year minimum waiting periods on drivers who have committed more than 2 alcohol offenses in a 5-year period. s. 343.31(3)(bm)3., 4. and 5., Stats., 23 U.S.C. s. 164. Convicted drunk drivers who are not subject to the federal requirement face escalating occupational license periods of up to 90 days.

The waiting period for an occupational license begins on the date the revocation or suspension is imposed and ends after the waiting period has elapsed. Where an appeal or other judicial activity, such as the reopening of a conviction, stays a suspension or revocation, any statutorily required waiting period is also stayed. If the conviction is upheld or reinstated, the Department reimposes the suspension or revocation and the waiting period picks up where it stopped. For example, if 10 days passed between the time a suspension was imposed and the time of appeal, upon re-entry of the conviction, DMV would re-impose the suspension or revocation, and impose the remaining portion of the required waiting period.

Sometimes drivers are convicted of multiple offenses at or near the same time. The offenses may or may not have been one incident or occurrence. Regardless, DMV applies the same occupational license waiting period rules. If the revocation or suspension periods begin simultaneously or nearly simultaneously, the waiting periods may run concurrently. If for some reason, however, the revocations or suspensions begin at different times, the driver will be subject to a waiting period for each revocation or suspension.

In some circumstances, DOT shortens a revocation or suspension because the driver has previously been suspended or revoked under different laws regulating the behavior that led to the driver's arrest. For example, a driver might be administratively suspended, revoked for refusing chemical tests, and convicted of operating while intoxicated as a result of one arrest. If the driver had one prior conviction for an alcohol-related offense (an offense countable under s. 343.307(1), Stats.) that occurred more than 5 years prior to his arrest for this second offense. The driver would face a 6-month suspension for the administrative suspension, a 2-year revocation for the refusal, and a 12 to 18 month revocation for the OWI conviction. No waiting period would be imposed for the administrative suspension. s. 343.305(8)(d), Stats. A 60-day wait would be imposed for the OWI conviction. s. 343.31(3)(bm)3., Stats. Finally, a 90-day wait would be imposed for the refusal revocation. s. 343.305(10)(b)3., Stats. If the court convicted the person of the refusal and OWI at the same time, their occupational license waiting periods would run simultaneously. If the convictions occur at different times, however,

the statutorily required waiting period would be imposed for each revocation. While the refusal revocation would be reduced by the “time served” under the OWI revocation in accordance with s. 343.305(10)(g), Stats., the driver would have to wait until “[a]fter the first 90 days of the revocation period” passes to obtain an occupational license. s. 343.305(10)(b)3., Stats. Nothing in s. 343.305 or 343.30(1q), Stats., permits occupational license waiting periods to be reduced by other occupational license waiting periods in the same manner that revocation periods are reduced.

Can a Court Waive or Change an Occupational License Waiting Period?

No. Court involvement in occupational license decision making is administrative not judicial. State v. Marcus, 259 Wis. 543 (1951); State v. Mollet, 67 Wis. 2d 574 (1975). Both WisDOT and the courts are bound to follow the licensing requirements of s. 343.10, Stats., including the mandatory minimum wait requirements for occupational licensing. Courts can waive or change any *discretionary* decision made by DMV in the licensing process under the procedure set forth in s. 343.10(4), Stats., but statutorily mandated requirements may not be set aside by DMV or a court.

Statutory Inconsistency. In the process of drafting this rule making, the Department discovered that an obsolete statutory reference to CDL occupational licenses remains in s. 351.07(1m), Stats. The issuance of CDL occupational licenses is now prohibited by federal law. 49 CFR 383.73(a)(3); 383.71(a)(7); 49 CFR 384.210. Wisconsin law was changed to conform to this federal requirement in 2003 Wis. Act 33. Section 2541 of that Act amended the existing s. 343.10(2)(c) to remove Department authority to issue occupational licenses permitting operation of commercial motor vehicles. At some point, the Department suggests the obsolete and ineffective language of s. 351.07(1m), Stats., be formally repealed.

Summary of, and preliminary comparison with, existing or proposed federal regulation: 23 U.S.C. s. 164 provides for “sanctioning” states that do not adopt certain strict driver licensing statutes affecting drunk drivers. One requirement imposed under this statute is that states may not issue occupational licenses to persons who drive drunk twice in any 5-year period until the person has had their operating privileges completely revoked for a full year. Wisconsin’s current statutes have been determined to comply with this requirement.

WisDOT cannot, by administrative rule, change these statutory waiting periods. If the legislature were to change them, the current federal “sanction” for noncompliance would *transfer* an amount equal to 3 percent of the funds apportioned to the State on that date under each of paragraphs (1), (3), and (4) of 23 U.S.C. § 104(b) from various highway programs to highway safety programs. For federal fiscal year 2008, the federal sanction would transfer 3% of 23 USC 104(b)(1) National Highway System funds, 3% of § 104(b)(3) Surface Transportation Program funds, and 3% of § 104(b)(4) Interstate Maintenance funds to 23 U.S.C. § 402 safety funds. Thus, the “sanction” for not complying with the federal repeat intoxicated driver law would be a loss of slightly more than \$15 million from the highway construction and maintenance program and a commensurate increase in highway safety monies.

Comparison with Rules in the Following States:

Michigan: Section 257.319(8) of the Michigan Vehicle Code establishes waiting periods for occupational licenses following OWI convictions in that state as follows:

- No waiting period during a license withdrawal for first offense (within 7 years) “driving while impaired.” Under Michigan law, “driving while visibly impaired” is a lesser charge than driving while under the influence of an intoxicant. Michigan Compiled Laws s. 257.319(8)(b).
- No waiting period during a license withdrawal for an underage person convicted of having a BAC between .02 and .08. Michigan Compiled Laws s. 257.319(8)(c). Second offense results in a 90-day suspension with no possibility of an occupational license. Michigan Compiled Laws s. 257.319(8)(d).
- No waiting period for regular vehicle privileges during a withdrawal resulting from a CDL violation involving a BAC between .04 and .08. Michigan Compiled Laws s. 257.319(8)(f).
- 30 days waiting period during a license withdrawal for first offense (within 7 years) operating while under the influence of an intoxicant or operating with any amount of a controlled substance. Michigan Compiled Laws s. 257.319(8)(a)
- 90 days waiting period during a license withdrawal for any of the above-described violations if a minor was in the car. Michigan Compiled Laws s. 257.319(8)(e).

There is a 1-year wait under Michigan law for being involved in various criminal activities, such as issuing a bomb threat under s. 257.319(11) of the Michigan Vehicle Code.

Minnesota: Section 171.30, Minnesota Statutes (2007) prohibits issuance of occupational CDL licenses and imposes the following waiting periods for occupational licenses (called “limited licenses” in that state) as follows:

- 15 days for first offense OWI or refusal Minn. Stat. s. 171.30(subd. 2a.(1))
- 60 day wait for persons whose operating privileges are withdrawn for any felony or hit and run. Minn. Stat. s. 171.30(subd. 2.)
- 90 days for second offense OWI within 10 years or 3rd offense in a lifetime. Minn. Stat. s. 171.30(subd. 2a.(2))
- 180 days for second offense refusal of testing within 10 years or 3rd offense in a lifetime. Minn. Stat. s. 171.30(subd. 2a.(3))
- One year for felony injury and homicide by intoxicated use violations. Minn. Stat. s. 171.30(subd. 2a.(4))

The waiting periods are doubled for persons under age 18 or who commit a violation with a BAC greater than 0.20. Minn. Stat. s. 171.30(subd. 2c)

Illinois: Section 6206 A31 of the Illinois statutes establish waiting periods for occupational licenses following OWI convictions in that state as follows:

- No wait for a first OWI. The occupational license must be approved by the court hearing the OWI case. 625 ILCS 6-206.1(a).
- One year wait for second and subsequent offense OWI. The driver must obtain permission for the occupational license from a review panel. 625 ILCS 6-208.1(a)4., 6-208(b)1.
- 3 year wait following second or subsequent refusals, homicide by intoxicated use and other offenses. 625 ILCS 6-208(a)3., 6-208(b)1. The driver must obtain permission for the occupational license from a review panel.

Illinois also imposes escalating waiting periods on persons under age 21 who violate absolute sobriety requirements. 625 ILCS 6-208.2

Iowa: Iowa Code s. 321.215 on “Temporary restricted licenses” covers occupational licensing in Iowa. There are no waiting periods for occupational licenses under Iowa law, though some offenders, such as persons convicted of drug offenses, may be completely ineligible for occupational licensing.

Summary of factual data and analytical methodologies used and how the related findings support the regulatory approach chosen: This proposed rule making would codify longstanding DMV administrative practice with regard to occupational license waiting periods. The promulgation of this regulation does not involve the interpretation of data.

Analysis and supporting documentation used to determine effect on small businesses: This proposed rule making has no effect on small business. The proposed rule simply codifies currently existing WisDOT practice and will not change the law or DMV’s application of the law. Accordingly, any effect on small business will be the same before and after adoption of this proposed rule amendment.

Effect on small business: This proposed rule will have no significant effect upon small businesses. The Department’s Regulatory Review Coordinator may be contacted by e-mail at ralph.sanders@dot.state.wi.us, or by calling (414) 438-4585.

Fiscal effect: The Department estimates that there will be no fiscal impact on the liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education district, sewerage district, or federally-recognized tribes or bands.

Anticipated costs incurred by private sector: The Department estimates that there will be no fiscal impact on state or private sector revenues or liabilities.

Agency contact person and place where comments are to be submitted and deadline for submission: The public record on this proposed rule making will be held open until close of business the day of the hearing to permit the submission of comments

in lieu of public hearing testimony or comments supplementing testimony offered at the hearing. Any such comments should be submitted to Rhonda Alley, Wisconsin Department of Transportation, Compliance and Restoration Section, 4802 Sheboygan Avenue, Room 301, P. O. Box 7983, Madison, WI 53707-7983. You may also contact Ms. Alley by phone at (608) 264-7002 or via e-mail: rhonda.alley@dot.state.wi.us. A copy of the rule may be obtained upon request from the Wisconsin Department of Transportation, Division of Motor Vehicles, Room 351, Hill Farms State Transportation Building, 4802 Sheboygan Avenue, Madison, WI 53707, telephone (608) 266-2237.

To view the proposed amendments to the rule, view the current rule, and submit written comments via e-mail/internet, you may visit the following website: <http://www.dot.wisconsin.gov/library/research/law/rulenotices.htm>.

TEXT OF PROPOSED RULE

SECTION 1. Trans 117.03(2)(n) is created to read:

Trans 117.03(2)(n) Any minimum mandatory waiting period required under s. 343.10(2)(a)4., Stats., or specified in any other provision of law has expired. The waiting period commences on the date the suspension or revocation is imposed. Each revocation or suspension imposed has its own waiting period. The waiting periods may run concurrently. Where waiting periods do not run concurrently, no credit may be granted for waiting periods resulting from multiple suspensions or revocations arising out of one incident or occurrence. A reduction in the length of a suspension or revocation does not affect the length of the waiting period for an occupational license. An appeal or other judicial action that stays a suspension or revocation also stays the running of any required waiting period for that suspension or revocation.

NOTE: s. 343.10(2)(a)4., Stats.

(END OF RULE TEXT)

Effective Date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Signed at Madison, Wisconsin, this ____ day of
July, 2008.

FRANK J. BUSALACCHI
Secretary
Wisconsin Department of Transportation