

Report From Agency

WISCONSIN DEPARTMENT OF CORRECTIONS

**PROPOSED RULE MAKING ORDER
CR 08-105**

I. INTRODUCTORY CLAUSE:

The Wisconsin Department of Corrections proposes an order to create DOC 332.20, relating to establishing a reimbursement fee to offset the costs of monitoring persons subject to global positioning system tracking or passive positioning system tracking.

II. TEXT OF RULE:

SECTION 1. Section DOC 332.20 is created to read:

DOC 332.20 Tracking fee. (1) APPLICABILITY. A person who is subject to GPS tracking or PPS tracking under s. 301.48, Stats., shall be charged a fee to offset the costs of the tracking, based on the person's ability to pay.

(2) DEFINITIONS. In this section:

(a) "Global positioning system tracking" or "GPS tracking" has the meaning given in s. 301.48 (1) (b), Stats.

(b) "Passive positioning system tracking" or "PPS tracking" has the meaning given in s. 301.48 (1) (dm), Stats.

(c) "Tracking cost" means the monthly cost for tracking a person subject to GPS tracking or PPS tracking.

(d) "Tracking fee" means the monthly fee which a person who is subject to either GPS tracking or PPS tracking is required to pay to offset the costs of tracking.

(3) TRACKING FEE. (a) A person who is subject to either GPS tracking or PPS tracking shall pay the tracking fee in accordance with procedures established by the department.

(b) The department shall set a tracking fee for a person who is subject to either GPS tracking or PPS tracking, based on the person's ability to pay, and shall do all of the following:

1. Determine the person's ability to pay the tracking fee. The department shall base the determination on the person's documented monthly gross household income. The department may require the person to produce financial documentation to establish

household income, including tax returns, financial institution account statements, and wage information.

2. Review the determination of the person's ability to pay the tracking fee at least annually. The department may require production of financial information for each review.

3. Assess the person a tracking fee up to and including the full tracking cost, if a person fails to provide the requested financial documentation.

4. Charge a tracking fee in accordance with the following table:

Table DOC 332.20

INCOME CATEGORY	TRACKING FEE
Less than \$800.00	\$00.00
\$800.00 - \$1500.99	\$50.00
\$1501.00 - \$2400.00	\$120.00
Greater than \$2400.00	\$240.00

5. Publish adjustments to Table DOC 332.20 in the Wisconsin administrative register.

6. Promulgate an administrative rule to make the adjustments, if the department proposes to make adjustment to the tracking fee by ten (10) percent or more. The department will not issue an emergency rule to implement the adjustments under this subsection before providing advance public notice of at least one month.

7. Establish a tracking fee schedule including all of the following:

- a. A grace period for the initial tracking fee payment.
- b. A deadline for receipt of each monthly tracking fee payment.

8. Approve procedures for the collection of tracking fees.

9. Provide the person who is required to pay a tracking fee with a copy of the tracking fee payment procedures.

10. Record all costs incurred as part of the tracking cost for monitoring a person on GPS tracking or PPS tracking.

11. Record all tracking fees paid by a person.

12. Provide the person with access to a copy of the record of payments to verify receipt of the payments.

13. Advise the person of nonpayment of tracking fees.

14. Credit the moneys collected to the appropriation account under s. 20.410 (1) (gk), Stats.

15. Audit the record of payments of tracking fees.

(4) DEPARTMENT ACTION WHEN A PERSON ON PROBATION, PAROLE, OR EXTENDED SUPERVISION FAILS TO PAY TRACKING FEE. The department may use any of the following actions in any order when a person who is required to pay a tracking fee and who is on probation, parole, or extended supervision fails to pay the tracking fee:

(a) Counseling.

(b) Wage assignment.

(c) Review of supervision or custody level to determine if more restrictive sanctions are needed, including an increase in the level of supervision, increase in the security level of custody, or detention in a jail, correctional facility or house of correction.

(d) Issue a recommendation for revocation of parole, probation, or extended supervision for the person's willful failure to pay the tracking fee.

(e) Intercept of the person's Wisconsin income tax refund or Wisconsin lottery winnings.

(f) Any other appropriate means of obtaining the tracking fee.

(5) DEPARTMENT ACTION WHEN A PERSON NOT ON PROBATION, PAROLE OR EXTENDED SUPERVISION FAILS TO PAY TRACKING FEE. The department may use any of the following actions in any order when a person who is required to pay a tracking fee but who is not on probation, parole, or extended supervision fails to pay the tracking fee:

(a) Wage assignment.

(b) Submission of the debt to a state contracted collection agency.

(c) Intercept of the person's Wisconsin income tax refund or Wisconsin lottery winnings.

(d) Any other appropriate means of obtaining the tracking fee.

SECTION 2. 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) (into.), Stats.

III. PREFACE

STATUTORY AUTHORITY: §§ 227.11 (2) and 304.074 Stats.

STATUTE INTERPRETED: § 301.48 (4), Stats.

EXPLANATION OF AGENCY AUTHORITY:

Under § 301.48, Stats., the department of corrections is responsible for the program of tracking by global positioning system or passive positioning system the location of persons who have committed a serious child sex offense.

RELATED STATUTE OR RULE: § 301.48, Stats.

PLAIN LANGUAGE ANALYSIS:

The rule establishes a fee to recover the costs of tracking a person subject to global positioning system (GPS) tracking or passive positioning system (PPS) tracking under § 301.48, Stats., based on the person's ability to pay. The department has established a tracking fee which is based on the gross household monthly income and the person's ability to pay. The fee structure is similar to the one used by the department for assessing monthly supervision fees under § DOC 328.045, Wis. Adm. Code. Specifically, for persons who have a gross household monthly income of less than \$800.00, there is no monthly fee; for persons who have a gross household monthly income from \$800.00 to \$1,500.99, the monthly fee is \$50.00; for persons who have a gross household monthly income from \$1,501.00 to \$2,400.00, the monthly fee is \$120.00; and for persons who have a gross household monthly income greater than \$2,400.00, the monthly fee is \$240.00.

Persons subject to GPS tracking or PPS tracking are required to produce financial information about their gross household income, including financial institution statements, wage statements, and tax returns. The department will use this financial information to determine the appropriate fee. If a person fails to provide the requested documentation, the department may assess a fee up to and including the full cost of tracking the person.

The department will review the tracking fee determination at least annually. Each time the department performs a review, it may request financial information.

The department has set forth the tracking fee structure in a table which will be published as part of the rule. The department recognizes that the table may need to be revised periodically. In the proposed rule the department will publish adjustments to the table in the Wisconsin Administrative Register if the adjustments constitute less than a ten (10) percent increase. If the increase is ten (10) percent or greater, the department will promulgate an administrative rule to make the necessary adjustments.

The department will establish procedures for notifying persons subject to the tracking fee of the procedures relating to the assessment and collection of fees. The department will record all tracking fees which are paid and provide the person making the payment a record of the payment.

The department has identified methods it can use to collect tracking fees in the case that a person fails to make payments when required to do so. For example, if the person is on probation, parole, or extended supervision, the methods include counseling, wage assignment, tax intercept under § 71.93, Wis. Stats., and steps which might affect the level of supervision. If the person is not on community supervision, the methods include

wage assignment, use of a collection agency, tax intercept under § 71.93, Stats., and any other appropriate means.

SUMMARY OF, AND COMPARISON WITH, EXISTING OR PROPOSED FEDERAL REGULATIONS.

Under 42 USC § 16981 the US Department of Justice may award grants to states, local governments, and Indian tribal government to establish a GPS monitoring program for sex offenders. There are no federal regulations which address the issue of assessing a fee for the costs of electronic monitoring or global positioning system tracking.

COMPARISON WITH RULES IN ADJACENT STATES.

1. Illinois: Illinois State law sections 730 ILCS 5/5-6-3.1 (persons on community supervision), 730 ILCS 5/5-7-1 (persons subject to periodic imprisonment), and 725 ILCS 207/40 (Sexually Violent Persons Commitment Act) provide for the Chief Judge of the county where the person was convicted or committed to assess reasonable fees for all costs incidental to electronic monitoring in accordance with the person's ability to pay. The fees are paid to the county clerk to defray the costs of the monitoring program. There are no state administrative regulations which address this issue.

2. Iowa: Iowa does not have either statutory or regulation provisions assessing a fee for electronic monitoring or global positioning system tracking of sex offenders.

3. Michigan: Under MCLA 791.285, Michigan statutes establish a lifetime electronic monitoring program for certain offenders. Under MCLA 791.285 (2), an individual who receives a sentence which includes lifetime electronic monitoring is required to reimburse the State of Michigan for the costs related to the program. The MI Department of Corrections has not developed rules concerning the lifetime electronic monitoring program.

4. Minnesota: Under MSA § 631.425 subd. 4, Minnesota statutes provide that a sheriff may assess the cost of electronic monitoring when an offender is released for work. There is not a similar statute for the electronic monitoring of sex offenders.

SUMMARY OF FACTUAL DATA AND ANALYTICAL METHODOLOGIES.

This rule does not affect small businesses. The rule imposes a fee on persons whom the Department monitors under GPS tracking or PPS tracking.

ANALYSIS AND SUPPORTING DOCUMENTS USED TO DETERMINE EFFECT ON SMALL BUSINESS OR IN PREPARATION FO ECONOMIC IMPACT REPORT.

The department is not required to prepare an economic impact report.

EFFECT ON SMALL BUSINESS.

The department does not anticipate any effect on small businesses.

FISCAL ESTIMATE. See attachment.

CONTACT PERSON:

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COMMENTS REGARDING THE PROPOSED RULE:

Written comments on the proposed rule were accepted into the public hearing record and received the same consideration as testimony presented at the hearing if they were received by Friday, December 19, 2008. Written comments were addressed to: Kathryn R. Anderson, DOC, P.O. Box 7925, Madison, WI 53707-7925, or by email kathryn.anderson@wisconsin.gov.

IV. APPLICABLE FORMS. There are no applicable forms.

V. STATEMENT EXPLAINING THE NEED FOR THE PROPOSED RULE.

Under § 301.48, Wis. Stats., the legislature established an electronic monitoring system which requires the Department of Corrections to track the location of certain sex offenders. The legislature also authorized the Department to promulgate rules to offset the cost of those who are subject to the electronic monitoring program. The purpose of the rule is to establish a procedure for assessing the fee on those who are subject to electronic monitoring.

VI. STATEMENT EXPLAINING THE BASIS AND PURPOSE OF THE PROPOSED RULE.

Under § 301.48 (4), Stats., the Department of Corrections may require an individual who is subject to electronic monitoring to pay for the cost of tracking based on the person's ability to pay. The purpose of the rule is to establish a procedure for setting, assessing and collecting an electronic monitoring or tracking fee. The Department will then be able to offset some of the costs of the monitoring program with the fees which are collected from those subject to GPS or PPS tracking.

VII. LIST OF PERSONS WHO APPEARED OR REGISTERED FOR OR AGAINST THE PROPOSED RULE AT THE PUBLIC HEARINGS.

Public Hearings:

State Office Building, Milwaukee

Jaime Birkholz appeared at the hearing but did not register for or against the proposed rule. Ms. Birkholz did not testify at the hearing.

Scott J. Brentmeier registered against the proposed rule and testified.

Department of Administration Building, Madison

Grover Maass registered against the proposed rule and testified.

Peter Bear appeared at the hearing but did not register for or against the proposed rule. Mr. Bear was present for informational purposes and did not testify.

Written Comments

Debra Swieciak, Karen and Claude Van Hefty, Ruth and Syl. Walker, Dan and Heidi Walker, and Glen P. Walker sent identical letters.

The Department also received letters from Ricardo Rangel, Eugene Frank, William T. Huggins, and Justin J. Wrobel.

The Department also received a telephone message from Robert Noble.

VIII. SUMMARY OF PUBLIC COMMENTS TO THE PROPOSED RULE AND THE AGENCY'S RESPONSE TO THE COMMENTS.

Public comments fell into several categories.

1. The statutory requirement for GPS or PPS monitoring and tracking is overly broad and should only apply to the most serious of sex offenders.

Response: The tracking requirement is established under § 301.48, Wis. Stats. The group of sex offenders who are subject to the requirement are those who have committed a serious child sex offense under § 301.48 (1) (e), including those who are found not guilty by reason of mental disease or mental defect, and those subject to lifetime tracking under § 980.08 (6m).

2. The legislature should not have made the statute apply retroactively to anyone being released from custody after a specific date, instead the legislation should have applied only to those offenders who were convicted after a certain date.

Response: This concern is beyond the scope of the Department's authority.

3. Requiring offenders to pay any fee is wrong when these individuals are already struggling to find and maintain employment and pay other living expenses.

Response: Under § 301.48 (4), the Department is authorized to collect from persons who are subject to tracking the fees to offset the costs of the program. Within the statutory scheme and the proposed rule, the Department is required in setting the fee amount to consider the individual's ability to pay, including the factors such as the person's financial resources, present and future earning ability, the needs and earning ability of the person's dependents, and other costs the person is required to pay in conjunction with his or her supervision by the Department of Corrections or the Department of Health Services.

4. The DOC should oppose the current legislation and attempt to change it to apply only to the worst offenders.

Response: This is beyond the authority of the Department of Corrections.

5. The legislation is unconstitutional because it is an ex post facto law.

Response: This comment must be addressed by the legislature and ultimately the Courts.

6. The devices are cumbersome and prone to faulty readings. For example, the signal can be lost in buildings which results in an alert.

Response: These comments are noted. However, the rule addresses only the fee to be assessed to offset the costs of the program.

7. The requirement applies to those who are not longer on probation, parole or extended supervision.

Response: The Department notes this comment but recognizes that it falls beyond the scope of the rule, which is limited to establishing a tracking fee schedule. The statute provides for the tracking program to apply to persons who no longer are under the supervision of the Department of Corrections or the Department of Health Services. There is a procedure under § 301.48 (6), for an individual to petition for the termination of lifetime tracking. Under very limited circumstances the Department of Corrections may file a petition requesting the termination of the requirement.

IX. EXPLANATION OF MODIFICATIONS MADE IN THE PROPOSED RULE AS A RESULT OF THE PUBLIC COMMENTS OR TESTIMONY RECEIVED AT PUBLIC HEARINGS.

No modifications were made.

X. LEGISLATIVE COUNCIL STAFF CLEARINGHOUSE REPORT.

See attached.

XI. RESPONSE TO LEGISLATIVE COUNCIL STAFF RECOMMENDATIONS IN THE CLEARING HOUSE REPORT.

1. **Statutory Authority.** In § DOC 332.20 (4) and (5), under what statutory authority may the department assign wages or intercept a tax refund or lottery winnings? In addition, it may be preferable to list all of the possible methods the department may use to collect payments rather than including a provision allowing the department to use “any other appropriate means of obtaining the tracking fee.”

Response: The Department has authority to use the tax intercept program for individuals who are on probation, parole or extended supervision under § 71.93 (1) (a) 5, Stats. For other individuals, the Department has the authority to use the program under § 71.93 (1) (a) 1, which defines a debt as “an amount owed to a state agency, if the amount has been reduced to a judgment or if the state agency has provided the debtor reasonable notice and an opportunity to be heard with regard to the amount owed.” The Department provides an individual subject to the tracking fee an opportunity to provide information regarding his or her ability to pay and to dispute the level of the tracking fee.

The Department includes as a tool for the collection of the tracking fees the assignment of wages. The Department’s authority is limited to statutory limitations, including the

restriction that any agreement for assignment of wages must be signed by the spouse of the person whose wages are being assigned. (See § 241.09, Stats.)

2. Form, Style, and Placement in Administrative Code.

a. The provisions of the rule summary that are included after the text of the rule should be placed to follow the plain language analysis. Also, the rule summary must include information under the heading “Related statute or rule” and “Place where comments are to be submitted and deadline for submission.”

Response: Accepted.

b. In § DOC 332.20 (3) (b) 1. and 2., the introductory material does not lead grammatically into the following subunits. Thus, this material should be numbered as subpar. A. in both cases and the following subpars. a. and b. should be renumbered as subpars. b. and c.

Response: Accepted in part and rejected in part. The Department agrees that the introductory materials do not lead grammatically into the following subunits. The Department renumbered all of the paragraphs sequentially 1 through 15, instead of the suggested approach since each paragraph stands alone.

c. In § DOC 332.20 (3) (b) 3. (Intro.), the phrase “all of” should be inserted after the word “including.”

Response: Accepted.

5. Clarity, Grammar, Punctuation and Use of Plain Language.

a. In § DOC 332.20 (3) (b)1., “will” should be replaced with “shall.”

Response: Accepted.

b. In Table DOC 332.20, “<” should be replaced with “Less than” and “>” should be replaced with “Greater than.”

Response: Accepted.

XII. FINAL REGULATORY FLEXIBILITY ANALYSIS.

The Department of Corrections has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in § 227.114, Stats.

XIII. ECONOMIC IMPACT REPORT.

Not applicable.

XIV. REPORT PREPARED BY THE DEPARTMENT OF ADMINISTRATION REGARDING AN ECONOMIC IMPACT REPORT.

Not applicable.

XV. CHANGES IN THE PROPOSED RULE'S PLAIN LANGUAGE ANALYSIS OR FISCAL ESTIMATE.

The Department clarified its authority to use the tax intercept program for the collection of tracking fees by inserting a reference to § 71.93, Stats., in the text of the plain language analysis.

The final fiscal estimate was revised to lower the number of offenders estimated to be on GPS by June 30, 2009 from 331 to 252. See attached.