

PROPOSED ORDER OF  
DEPARTMENT OF HEALTH SERVICES  
TO ADOPT RULES

The Wisconsin Department of Health Services proposes to create ch. DHS 19, relating to reduction or waiver of penalties for voluntary self-disclosure by a small business of actual or potential violations of rules or guidelines, and affecting small businesses.

**SUMMARY OF PROPOSED RULE**

**Statute interpreted:** Section 895.59, Stats.

**Statutory authority:** Sections 227.11 (2) and 895.59 (2), Stats.

**Explanation of agency authority:**

The rules created under s. 895.59 (2) Stats., are required to include a reduction or waiver of penalties for voluntary disclosure by a small business of actual or potential violations of rules or guidelines. Section 895.59 (2) Stats., further requires that the rule specify when the use of discretion in the enforcement of a rule or guideline against a small business will not be allowed. Section 895.59 (2), Stats., includes a list of circumstances under which discretion is not allowed. These circumstances must also be included in the rule. The rules may include consideration of a violator's ability to pay when determining the amount of any monetary penalty, assessment, or surcharge.

**Related statute (s) or rule (s):**

Section 895.59 Stats.

**Plain language analysis:**

The Department proposes to create a rule consistent with the requirements of s. 895.59, Stats., by indicating when the Department may use discretionary enforcement concerning small businesses and when discretionary enforcement concerning small businesses is prohibited.

**Summary of, and comparison with, existing or proposed federal regulation:**

There appear to be no proposed or existing federal regulations that are intended to address the activities to be regulated by the proposed rule.

**Comparison with rules in adjacent states:**

**Illinois:**

There appear to be no rules in Illinois that are similar to the proposed rules.

**Iowa:**

There appear to be no rules in Iowa, that are similar to the proposed rules.

**Michigan:**

There appear to be no rules in Michigan that are similar to the proposed rules.

**Minnesota:**

There appear to be no rules in Minnesota that are similar to the proposed rules.

**Summary of factual data and analytical methodologies:**

The Department reviewed statutes that authorize enforcement to determine the limitations if any of whether discretionary enforcement could be used and the extent of that discretion.

**Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:**

Entities that may be affected by the proposed rules include the following: Emergency Medical and Ambulance Service Providers; Asbestos & Lead Abatement Providers, Consultants, and Trainers; Hotels and Motels; Bed and Breakfast Establishments; Tourist Rooming Houses; Recreational and Educational Campgrounds; Restaurants (including mobile restaurants); Tattoo and Body Piercing Establishments; Tanning Bed Facilities; Public Pools; Vending Machine Operators; WIC Vendors; persons subject to licensing and regulation under ch. DHS 157; other entities regulated by the Department's Division of Public Health; and certain Medical Assistance providers regulated by the Department's Division of Health Care Access and Accountability.

Section 895.59, Stats., is applicable only to small businesses that are not covered under ss. 48.685 or 50.065, Stats. Because the rule requires a reduction or waiver of a penalty for voluntary disclosure of a violation, it is likely that the rule will have a positive fiscal effect on those businesses that receive a waiver or reduction.

**Effect on small business:**

The proposed rules will have a direct impact on a substantial number of small businesses that are not covered under ss. 48.685 or 50.065, Stats. The economic impact on the businesses affected by this rule is indeterminate.

**Agency contact person:**

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**Place where comments are to be submitted and deadline for submission:**

A public hearing will be held on February 18, 2010, 1:00 p.m. to 3:00 p.m. at the Wilson Street State Office Building, 1 W. Wilson St., Rm. 638A, Madison, WI. Comments may be submitted to the agency contact person listed above or to the Wisconsin Administrative Rules Website at [www.adminrules.wisconsin.gov](http://www.adminrules.wisconsin.gov) until February 18, 2010, 4:30 p.m.

## TEXT OF PROPOSED RULE

SECTION 1. Chapter DHS 19 is created to read:

### Chapter DHS 19 DISCRETIONARY ENFORCEMENT OF RULES AND GUIDELINES AGAINST SMALL BUSINESSES

DHS 19.01 Authority and purpose.

DHS 19.02 Applicability.

DHS 19.03 Definitions.

DHS 19.04 Use of discretion in enforcement.

DHS 19.05 Limitations on the use of discretion.

**DHS 19.01 Authority and purpose.** This chapter is promulgated under the authority of s. 895.59, Stats., to describe the discretion the department may exercise in enforcement actions against small businesses regulated by the department.

**DHS 19.02 Applicability.** These rules apply to the department and small businesses regulated by the department.

**DHS 19.03 Definitions.** In this chapter:

(1) “Department” means the department of health services.

(2) “Small business” has the meaning given in s. 895.59 (1) (b), Stats.

Note: Under s. 895.59, Stats., and this chapter a small business does not include an entity as defined in s. 48.685 (1) (b) or 50.065 (1) (c), Stats., which is subject to the caregiver law.

**19.04 Use of discretion in enforcement.** (1) The department may waive or reduce a penalty otherwise applicable to a small business that voluntarily discloses an actual or potential violation of a statute, rule or department guideline and requests a waiver or reduction as a small business, if the department is not prohibited under s. DHS 19.05 from reducing or waiving the penalty.

(2) In exercising discretion under sub. (1), the department will follow the applicable state or federal statute, federal regulation, or department rule or guideline when taking an enforcement action against a small business, except that, on a case-by-case basis, the department may use discretion to reduce or waive a penalty based on consideration of the history of violations, the type of business, the severity of the violation and its impact on the public’s health safety and welfare, state or federal statutory requirements for enforcement, and any other relevant factor.

(3) (a) A reduction or waiver of any penalty may not be below any limits established by state or federal statute or regulation.

(b) In determining a reduction in a monetary penalty, the department may consider the small business’s ability to pay.

**DHS 19.05 Limitations on the use of discretion.** The department will not exercise discretion under s. DHS 19.04 (1) in the enforcement of a rule or guideline under any of the following circumstances:

- (1) The department discovers the violation before the small business discloses the violation.
- (2) The violation is disclosed after a department audit or inspection of the small business has been scheduled.
- (3) The violation was identified as part of the monitoring or sampling requirements that are consistent with the requirements under an existing permit, certificate, or license.
- (4) The violation results in a substantial economic advantage for the small business.
- (5) The small business has repeatedly violated the same statute, rule or guideline.
- (6) The violation may result in imminent endangerment to the environment or to public health or safety.
- (7) A state or federal statute, federal regulation or department rule prohibits the department's exercise of discretion.
- (8) The business is operating without a certificate, permit, or license.
- (9) The business fails to provide the department with credible and verifiable information that it is a small business.
- (10) The violation was willful.

**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), Stats.

Wisconsin Department of Health Services

Dated:

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Karen E. Timberlake, Secretary

SEAL: