

**WISCONSIN DEPARTMENT OF HEALTH SERVICES
PROPOSED ORDER TO ADOPT EMERGENCY RULES**

The Wisconsin Department of Health Services (“the Department”) proposes an order to **amend** DHS 137.03 (3) and 137.04 (1) (a), (b), and (2) (b), relating to the Wisconsin donor registry for anatomical gifts.

FINDING OF EMERGENCY

An emergency rule is necessary to protect the public peace, safety, and welfare. The rule governs the use of the Wisconsin Donor Registry, which is a lifesaving and time-sensitive registry. According to the Organ Procurement and Transplantation Network (OPTN), one donor can save the lives of up to eight people. More than 100,000 people in the United States are waiting to receive an organ transplant, and, as of August 29, 2022, there are over 1,600 individuals on the waitlist from Wisconsin. This rule seeks to lower the age requirement for registering as a potential anatomical donor, which would thereby expand the number of donors on the registry—which would further increase its potential to save lives. Promulgating an emergency rule would allow the Registry to expand sooner than if the agency had to comply with all the procedures in chapter 227 of the Wisconsin Statutes.

RULE SUMMARY

Statutes interpreted

Section 157.06 (4), Stats.

Statutory authority

The Department is authorized to promulgate the rule based upon explicit statutory language in ss. 157.06 (20) and 227.11 (2)(a), Stats.

Explanation of agency authority

Section 227.11(2), Stats., gives the department authority to “promulgate rules interpreting the provision of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute.” Section 157.06 (20), Stats., authorizes the Department to establish a donor registry, and to “promulgate administrative rules governing any donor registry established under this subsection.” Section 157.06 (4) identifies that the following individuals can make anatomical gifts:

- (a) The donor, if he or she is at least 15 years of age or is an emancipated minor.
- (b) An agent of the donor, unless the donor's power of attorney for health care instrument under ch. 155 or some other record prohibits the agent from making an anatomical gift.
- (c) A parent of the donor, if the donor is an unemancipated minor and does not object to the making of the anatomical gift.
- (d) A guardian of the donor unless a health care agent under ch. 155 has authority to make an anatomical gift of the donor's body or part.

The Department incorporated these provisions into the donor registry rules established under s. 157.06 (20), Stats. Section 227.24 (1) further permits an agency to promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements under chapter 227 if preservation of the public peace, health, safety, or welfare necessitate putting the rule into effect sooner.

Related statute or rule

Section 29.024, Stats.

Section 157.06, Stats.

Section 343.07 (1g), Stats.

Plain language analysis

The proposed changes to Chapter DHS 137 would modify the rule to lower the age requirement for those who may make a record of anatomical gift in the Wisconsin Donor Registry. Consistent with statutory language at the time the rule last amended in 2010, the current rule provides that when you apply for a driver's permit at 15 ½, you may add your name to the Wisconsin donor registry. 2021 Wis. Act 64 amended s. 343.07 (1g) to lower the age for a driver's permit from 15 ½ to 15 years, and 2021 Wis. Act 220 similarly amended s. 157.06 (4) (a) to lower the age requirement for making an anatomical gift to 15 years, with a parent or guardian able to revoke that decision for anyone under 18 years old. The proposed rule will make Chapter DHS 137 consistent with statutes by replacing all references to 15 ½ years of age in the rule with 15 years of age.

No viable alternatives exist to rulemaking. Without the proposed revisions to Chapter DHS 137, administrative rules regarding the Wisconsin donor registry will not be consistent with Wisconsin Statutes.

Summary of, and comparison with, existing or proposed federal regulations

There are federal regulations regarding the recovery and distribution of donated organs, tissues, and eyes. For organs, regulation includes the 1984-National Organ Transplant Act (NOTA-P.L. 98-507). NOTA established the framework for the OPTN within the United States, the Scientific Registry of Transplant Recipients, a government unit within the Public Health Service (Division of Transplantation) to oversee contractual activities of the OPTN and prohibited the buying and selling of organs. The regulation and distribution of donated tissue is governed by the Food and Drug Administration. These rules and regulations govern the distribution of organs and tissues once recovered. Rules regarding registries and consent for donation are determined by states.

Comparison with rules in adjacent states**Illinois:**

Illinois statute allows 16- and 17-year-olds to give consent to donate their organs and tissue at the time of their death, with a single limitation. The procurement organizations must make a reasonable effort to contact a parent or guardian to ensure they approve of the donation. The parent or guardian will have the opportunity to overturn the child's decision. Once the 16- or 17-year-old turns 18, his/her decision would be considered legally binding without limitation. Applicable law found in 755 ILCS 50/5.

Iowa:

Iowa statute states that an anatomical gift of a donor's body or part may be by any of the following: (1) An adult. (2) A minor, if the minor is emancipated. (3) A minor, if the minor is authorized under state law to apply for a driver's license or identification card because the minor is at least fourteen years of age, and the minor authorizes a statement or symbol indicating an anatomical gift on a driver's license, identification card, or donor registry entry with the signed approval of a parent or guardian. (4) A minor, if the minor is authorized under state law to apply for a hunting, fishing, or fur harvester license, the minor is at least fourteen years of age, and the minor authorizes a symbol indicating an anatomical gift on a hunting, fishing, or fur harvester license with the signed approval of a parent or guardian. If a donor who is an unemancipated minor dies, a parent of the donor who is reasonably available may revoke or amend an anatomical gift of the donor's body or part. Applicable law found in Iowa Code §142C.

Michigan:

An anatomical gift of a donor's body or body part may be made during the life of the donor for the purpose of transplantation, therapy, research, or education in the manner provided by any of the following: (a) The donor, if the donor is an adult or if the donor is a minor and meets 1 or more of the following requirements: (i) Is emancipated. (ii) Has been issued a driver license or identification card because the donor is at least 16 years of age. (b) An agent of the donor, unless the power of attorney for health care or other record prohibits the agent from making an anatomical gift. Public Applicable laws are found in Michigan Public Health Code § 333.10104.

Minnesota:

An emancipated minor or a minor who is at least 16 years old may make an anatomical gift during the life of the minor. However, upon the death of an unemancipated minor, the minor's parent may revoke or amend an anatomical gift or may revoke the minor's refusal to make an anatomical gift. Applicable law is found in Minnesota Statute Chapter 525A.04 and 525A.

Summary of factual data and analytical methodologies

The proposed rule is being promulgated to conform an existing rule to statute. No factual data or sources were relied upon.

Analysis and supporting documents used to determine effect on small business

The proposed rule is anticipated to have no economic impact.

Effect on small business

The proposed rule is anticipated to have no effect on small business.

Agency contact person

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Statement on quality of agency data

The data used by the Department to prepare these proposed rules and analysis comply with s. 227.14 (2m), Stats.

Place where comments are to be submitted and deadline for submission

Comments may be submitted to the agency contact person that is listed above until the deadline given in the upcoming notice of public hearing. The notice of public hearing and deadline for submitting comments will be published in the Wisconsin Administrative Register and to the department's website, at <https://www.dhs.wisconsin.gov/rules/active-rulemaking-projects.htm>. Comments may also be submitted through the Wisconsin Administrative Rules Website, at: <https://docs.legis.wisconsin.gov/code/chr/active>.

RULE TEXT

SECTION 1. DHS 137.03 (3) is amended to read:

DHS 137.03 (3) "Record of intent" means a statement or symbol in the department of transportation electronic database that indicates an individual responded affirmatively to the donor question when applying for a driver's license or identification card before March 29, 2010 or before the individual was at least 15 ~~and one-half~~ years of age.

SECTION 2. DHS 137.04 (1) (a), (b), and (2) (b) are amended to read:

DHS 137.04 (1) (a) Beginning March 29, 2010, an individual at least 15 ~~and one-half~~ years of age who indicates a desire to register as an organ, tissue, and eye donor when applying for or renewing a Wisconsin driver's license or identification card makes an anatomical gift of organs, tissues and eyes by authorizing his or her inclusion in the registry. The department of transportation's inclusion of a statement or symbol in its database that the individual has indicated a desire to register as an organ, tissue, and eye donor constitutes a record of an anatomical gift under s. 157.06 (2) (t), Stats.

DHS 137.04 (1) (b) An individual who is at least 15 ~~and one-half~~ years of age and has a Wisconsin driver's license or identification card may authorize his or her inclusion in the registry as a means of making an anatomical gift of organs, tissues and eyes by completing a form available on the Wisconsin donor registry website. The department shall forward the individual's authorization to the department of transportation, or the individual may write to the Wisconsin department of transportation. The department of transportation's entry of a statement or symbol in its database indicating that the individual has made an anatomical gift shall constitute a record of gift under s. 157.06 (2) (t), Stats.

DHS 137.04 (2) (b) An individual under 15 ~~and one-half~~ years of age, who indicates a desire to make an anatomical gift when applying for a Wisconsin driver's license or identification card, or who has a driver's license or identification card and communicates in writing to the department of transportation a desire to make an anatomical gift or indicates a desire to make an anatomical gift by completing the donor form on the registry website, has stated an intent to make an anatomical gift.

SECTION 3. EFFECTIVE DATE. This rule takes effect upon publication in the state newspaper and shall remain in effect for 150 days, as provided in s. 227.24 (1) (c), Stats., subject to extensions under s. 227.24 (2), Stats.