



## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

**2003 Senate Bill 100**

**Assembly Substitute  
Amendment 1**

*Memo published:* March 1, 2004

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*Senate Bill 100* relates to administrative rule making regarding small businesses, data used by administrative agencies in preparing proposed rules, increasing attorney fees, creating an Internet site for proposed rules, and creating a Small Business Regulatory Review Board.

*Assembly Substitute Amendment 1* contains the following provisions:

### **Small Business Regulatory Review Board**

The substitute amendment creates a Small Business Regulatory Review Board, which is attached for administrative purposes to the Department of Commerce. The board consists of representatives of eight state agencies, six representatives of small business, and the chairpersons of one Senate and one Assembly committee concerned with small businesses. The eight agencies represented on the board are the Departments of Administration; Agriculture, Trade and Consumer Protection; Commerce; Health and Family Services; Natural Resources; Regulation and Licensing; Revenue; and Workforce Development.

Under the substitute amendment, when an agency publishes a proposed rule that may have a significant impact on small businesses, after its submission to the Legislative Council Rules Clearinghouse, the agency must also submit the rule to the Small Business Regulatory Review Board. The board is permitted to use cost-benefit analysis to determine the fiscal effect of the rule on small businesses and must determine whether the agency has complied with specified statutory requirements. If the board determines that the rule does not include an enforcement provision or that the agency has failed to comply with the specified statutory requirements, the board is required to notify the agency of that determination and ask the agency to comply. The board may also submit suggested changes in the proposed rule to the agency, including proposals to reduce the use cross-references in the rule. A report of these suggestions and of any notice of failure to include enforcement provisions or comply with the statutory provisions is to be sent to the Legislative Council staff. The notification may include a request that the agency do any of the following: (1) verify that the proposed rule does not conflict with, overlap,

or duplicate other rules or federal regulations; or (2) require the inclusion of fee information and fee schedules in the rule's analysis, including why fees are necessary and for what purpose the fees will be used.

The substitute amendment includes similar provisions for review by the Small Business Regulatory Review Board of emergency rules that may have a significant economic impact on small businesses. With respect to emergency rules, if the board determines that an agency has failed to comply with specified statutes, the board must notify the agency of that determination and ask that agency to comply. In addition, the board may submit suggested changes in the proposed rule to the agency and may include a request that an agency do any of the following: (1) explain how the agency has responded to comments received from small businesses regarding emergency rules; or (2) verify that the emergency rule does not conflict with, overlap, or duplicate other rules or federal regulations.

### **Definition of "Small Business"**

The substitute amendment modifies various statutory definitions of "small business," which is defined in current law as a business entity that employs fewer than 25 full-time employees or that has gross annual sales of less than \$2.5 million. The definition is modified to mean a business entity that employs 25 or fewer full-time employees or which has gross annual sales of less than \$5 million.

### **Agency Advice**

The substitute amendment provides that a small business may commence an action against an agency for injunctive relief to prevent the imposition of a penalty if the small business is subject to the penalty as a result of any of the following:

- The small business acted or failed to act due to the failure by the agency's employee, officer, or agent with regulatory responsibility for that legal requirement to respond to a specific question in a reasonable time.
- The small business acted or failed to act in response to inaccurate advice given to the small business by the agency's employee, officer, or agent with regulatory responsibility for legal requirement.

The small business may commence the action in the circuit court in the county where the property affected is located or, if no property is affected, in the circuit court in the county where the dispute arose. The court may issue an order enjoining imposition of the penalty if it determines that either of the above items applies.

For purposes of this provision, "small business" does not include an entity that is subject to the caregiver background check law that is administered by the Department of Health and Family Services (DHFS).

### **Rule Revisions**

The substitute amendment modifies the current law that requires that when an agency proposes a rule that may have an effect on small businesses, the agency must consider specified methods for

reducing the impact of the rule on small businesses. This is modified to apply also when an agency revises a rule.

### **Agency Coordinator**

The substitute amendment requires an agency to designate a small business regulatory coordinator to act as a contact person for small business regulatory issues and to publicize that person's electronic mail address and telephone number. In addition, a hearing notice regarding a proposed rule must include the electronic mail address and telephone number of the small business regulatory coordinator and a link to an Internet site that allows a person to review the rule and make comments regarding the rule.

### **Statement of Scope**

The substitute amendment requires agencies to include in their statement of scope on proposed rules a description of all of the entities that will be affected by the rule.

### **Quality of Agency Data**

The substitute amendment requires each agency, in cooperation with the Department of Administration, to ensure the accuracy, integrity, objectivity, and consistency of the data that is used when preparing a proposed rule and when completing an analysis of a proposed rule. Agencies are required to reduce the amount of cross-references to the statutes in rules. In addition, a person affected by a proposed rule may submit comments to the agency regarding the accuracy, integrity, or consistency of that data.

### **Legislative Council Internet Site**

The substitute amendment requires the Joint Legislative Council to create and maintain an Internet site that includes a copy of each proposed rule in a format that allows searching by key words. Agencies are required to provide the Joint Legislative Council with the proposed rules and any other information needed to comply with this requirement in a format required by the Joint Legislative Council. The Internet site must include a section devoted to proposed rules affecting small business. In addition, it must include all of the following:

- The electronic mail address and telephone number of an agency contact person for each proposed rule.
- The analysis, reference to applicable forms, and fiscal estimates for proposed rules.
- Any report submitted to the Legislative Council staff by the Small Business Regulatory Review Board.
- The written report of the Legislative Council Rules Clearinghouse on a proposed rule and any agency comments regarding that report.
- The time, date, and place of any public hearing.

- The place where comments on the proposed rule should be submitted and the deadline for submitting those comments.

### **Effective Dates of Rules**

The substitute amendment provides that if a rule has a significant economic impact on small businesses, the rule applies to small businesses on the first day of the third month commencing after the date of publication of the rule.

### **Review of Existing Rules and Guidelines**

The substitute amendment states that the Small Business Regulatory Review Board may review the rules and guidelines of any state agency to determine whether they place an unnecessary burden on the ability of small businesses to conduct their affairs. If the board determines that a rule or guideline does so, it is required to submit a report and recommendations regarding the rule or guideline to the Joint Committee for Review of Administrative Rules (JCRAR).

When reviewing the report, JCRAR must consider all of the following:

- The continued need for the rule or guideline.
- The nature of the complaints and comments received from the public regarding the rule or guideline.
- The complexity of the rule or guideline.
- The extent to which the rule or guideline overlaps, duplicates, or conflicts with federal regulations, other state rules, or local ordinances.
- The length of time since the rule or guideline has been evaluated.
- The degree to which technology, economic conditions, or other factors have changed in the subject area affected by the rule or guideline since it was promulgated.

JCRAR may refer the report regarding the rule or guideline to the presiding officers of each house of the Legislature for referral to a standing committee or may review the rule or guideline itself.

### **Validity of Rules**

The substitute amendment modifies the statute that lists judicial proceedings in which the validity of a rule may be determined to include the new provision regarding small businesses obtaining an injunction to prevent the imposition of a penalty in specified circumstances (described above) and to include determinations by the Small Business Regulatory Review Board with respect to an agency's compliance with statutory provisions and inclusion of enforcement provisions.

### **Attorney Fees**

The substitute amendment modifies the statute that provides that if an individual, a small nonprofit corporation, or a small business is the prevailing party in an action by a state agency or proceeding for judicial review, and submits a motion for costs, the court must award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that make the award unjust. Current law states that attorney or agent fees may not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee. The substitute amendment increases the amount to \$150 per hour.

### **Rules Regarding Agency Discretion in Enforcement**

The substitute amendment requires each agency to promulgate a rule that requires the agency to disclose in advance the discretion that the agency will follow in enforcement of rules and guidelines against a small business. The rule must include the reduction or waiver of penalties for voluntary disclosure, by a small business, of actual or potential violations of rules or guidelines. The rule may include consideration of a violator's ability to pay when determining the amount of any monetary penalty, assessment, or surcharge.

The rule must specify when the agency will not allow discretion in the enforcement of a rule or guideline against small businesses and must include all of the following situations in which discretion is not allowed:

- The agency discovers the violation before the small business discloses the violation.
- The violation is disclosed after an agency audit or inspection of the small business has been scheduled.
- The violation was identified as part of the monitoring or sampling requirements that are consistent with the requirements of an existing permit.
- The violation results in a substantial economic advantage for the small business.
- The small business has repeatedly violated the same rule or guideline.
- The violation may result in an imminent endangerment to the environment, or to public health or safety.

For purposes of this provision, "small business" does not include an entity that is subject to the caregiver background check law that is administered by DHFS.

### **Legislative History**

Assembly Substitute Amendment 1 was introduced by Representative Terri McCormick. On February 24, 2004, the substitute amendment was adopted by the Assembly, and the Assembly concurred in the bill as amended, both by voice votes.

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