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Wisconsin REINS Act signed into law

On August 9, 2017, Governor Walker signed into law 2017 Wisconsin Act 57 known as the Wisconsin Regulations from the Executive in Need of Scrutiny Act (WI REINS Act). Named for similar legislation pending in the U.S. Congress, the WI REINS Act does the following:

- Provides for more public input during an agency's administrative rule writing process
- Requires legislation authorizing any administrative rule with compliance and implementation costs of \$10 million or more over a two-year period
- Allows the Joint Committee for the Review of Administrative Rules (JCRAR) to indefinitely suspend promulgation of a proposed rule for reasons specified in statute

Wisconsin statutes establish a sequential process for the promulgation of an administrative rule that generally includes: gubernatorial approval of a scope statement detailing the rule's purpose, agency drafting of the proposed rule, agency review of the proposed rule's economic impact, agency public hearing for most rules, agency revisions to a proposed rule, gubernatorial approval of a final draft rule, review by the appropriate standing committee in each house of the legislature and review by JCRAR. Emergency rules are not subject to all of these requirements.

Increased public input

An agency cannot begin drafting a rule until the governor approves the agency's scope statement describing the statutory authority for the rule and its purpose and impact on regulated entities and individuals. Under the WI REINS Act, following approval, either JCRAR co-chair may direct the agency to open a comment period and hold a public hearing. Agency staff must report comments to the agency head and, if the rule moves forward, include them in the rule analysis published in the Wisconsin Administrative Register and distributed to the legislature.

An agency may also voluntarily open a comment period and hold hearing on a scope statement once approved by the governor. In addition, the agency may voluntarily hold a hearing on the general subject matter of a possible or anticipated rule prior to preparing a scope statement.

Regulatory costs exceeding \$10 million

Under current law, an agency must complete an economic impact analysis (EIA) of a proposed rule prior to submitting it to the governor for approval. The EIA must consider and evaluate issues set out in statute, including the implementation and compliance costs that are reasonably expected to be incurred or passed on to businesses, local governments and individuals.

Under the WI REINS Act, the legislature has two opportunities to request an independent economic impact analysis (IEIA). First, once the EIA is completed but before the final draft rule is submitted to the governor for approval, either JCRAR co-chair may contract with a third party for an IEIA if approved by the Committee on Organization of the house in which the co-chair serves. The IEIA must include the same analysis as the EIA.

Second, when JCRAR receives a final draft rule for review, it may again contract with a third party for an IEIA upon a majority vote of the committee and approval by the Senate and Assembly Committees on Organization. JCRAR has this authority regardless of whether an IEIA was previously prepared in response to the request of a co-chair.

Under the WI REINS Act, if either the EIA or IEIA indicates that implementation and compliance costs incurred or passed on to businesses, local governments and individuals are reasonably expected to be at least \$10 million over any two-year period, the agency must cease all work on the proposed rule. The rule may go forward under only two circumstances: first, the legislature enacts a bill authorizing promulgation or second, the agency revises the rule and a subsequent EIA or IEIA indicates that implementation and compliance costs have fallen below \$10 million.

Legislative authorization is generally not required for an air quality rule proposed by the Wisconsin Department of Natural Resources, regardless of cost, if it is for the purpose of complying with an explicit call for a state implementation plan (SIP) by the U.S. Environmental Protection Agency.

Indefinite suspension of the rule promulgation process

Under current law, JCRAR may temporarily block a proposed rule if, by a majority vote, the committee objects to it for a reason specified in statute (e.g., the agency lacks statutory authority for the rule). Following a vote to suspend promulgation, JCRAR must introduce legislation in each house of the legislature supporting its action. If neither of those bills is enacted into law, the agency may promulgate the rule.

The WI REINS Act establishes an alternative to this process which allows for indefinite suspension of rulemaking. If JCRAR invokes the alternative, the committee's action to halt promulgation is indefinite and may be reversed only under two circumstances: the committee withdraws its objection or the legislature enacts a law authorizing promulgation.

Constitutional considerations

Some lawmakers have questioned whether indefinite suspension of the rule promulgation process due to the economic impact or a JCRAR objection violates the bicameralism and presentment requirements of the Wisconsin Constitution. However, while the Wisconsin Supreme Court has held that only the formal bicameral enactment process can make the suspension of an existing rule permanent, it has not considered whether formal bicameral enactment is required to indefinitely interrupt the rule promulgation process.

Conclusion

Six years ago, 2011 Wisconsin Act 21 modified agency rulemaking authority in order to prevent agencies from writing rules without legislative authorization and granted the governor authority to stop rule promulgation by an agency. The WI REINS Act establishes new legislative checks on the exercise of agency regulatory authority and increases opportunities for public input into the rulemaking process.