## State of Misconsin 2021 - 2022 LEGISLATURE

LRB-4944/1 MED:amn

## **2021 SENATE BILL 722**

November 19, 2021 - Introduced by Senators Nass and Stroebel, cosponsored by Representatives Dittrich, Neylon, Penterman, Skowronski, Edming, VanderMeer, Sortwell, Brandtjen, Kuglitsch, Zimmerman, Mursau, Thiesfeldt, Knodl and Murphy. Referred to Committee on Labor and Regulatory Reform.

1	AN ACT to repeal $35.93$ (2) (b) $3. \text{ im., } 227.01$ (3m), $227.05$ and $227.112$ ; to amend
2	13.91 (1) (c), subchapter II (title) of chapter 227 [precedes 227.10], 227.40 (1),
3	$227.40\ (2)\ (intro.),\ 227.40\ (2)\ (e),\ 227.40\ (3)\ (ag),\ 227.40\ (3)\ (ar),\ 227.40\ (3)\ (b),\ (ar),\ (ar$
4	227.40 (3) (c) and 227.40 (4) (a); and <i>to create</i> 227.10 (1m) of the statutes;
5	relating to: guidance documents issued by state agencies.

### Analysis by the Legislative Reference Bureau

Subject to certain exceptions, current law contains provisions requiring agencies to 1) submit proposed guidance documents to the Legislative Reference Bureau for publication in the Wisconsin Administrative Register and provide a period for public comments on the proposed guidance documents, and 2) identify the applicable provision of federal law or the applicable state statutory or administrative code provision that supports any statement or interpretation of law that the agency makes in publications regarding the laws the agency administers. In *Service Employees International Union (SEIU)*, *Local 1 v. Vos*, 2020 WI 67, the Wisconsin Supreme Court held that the provision on guidance documents is facially unconstitutional and that the requirement to identify state statutory or administrative code provisions is facially unconstitutional to the extent that it addresses guidance documents.

This bill repeals these provisions and replaces them with a provision affirming that any document or communication that an agency issues or provides in order to explain the agency's implementation of a statute or rule enforced or administered by

the agency or to provide guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency must be consistent with applicable statutes, rules, and other sources of law. The bill further provides that, except when otherwise provided by law, any such document or communication does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any license. The bill also repeals associated provisions that provide for judicial review of guidance documents. The bill does not, however, affect the ability of persons to challenge that a statement, standard, or order was not promulgated as a rule as required under current law (see, e.g., Frankenthal v. Wisconsin Real Estate Brokers' Board, 3 Wis.2d 249 (1958) and Heritage Credit Union v. Office of Credit Unions, 2001 WI App 213).

# The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1	<b>SECTION 1.</b> 13.91 (1) (c) of the statutes is amended to read:										
2	13.91 (1) (c) Perform the functions prescribed in ch. 227 relating to										
3	administrative rules and guidance documents.										
4	<b>Section 2.</b> 35.93 (2) (b) 3. im. of the statutes is repealed.										
5	SECTION 3. 227.01 (3m) of the statutes is repealed.										
6	Section 4. 227.05 of the statutes is repealed.										
7	Section 5. Subchapter II (title) of chapter 227 [precedes 227.10] of the statutes										
8	is amended to read:										
9	CHAPTER 227										
10	SUBCHAPTER II										
11	ADMINISTRATIVE RULES AND										
12	GUIDANCE DOCUMENTS										
13	<b>Section 6.</b> 227.10 (1m) of the statutes is created to read:										
14	227.10 (1m) Any document or communication that an agency issues or provides										
15	in order to explain the agency's implementation of a statute or rule enforced or										

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administered by the agency or to provide guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency shall be consistent with applicable statutes, rules, and other sources of law. Except when otherwise provided by law, any such document or communication does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any license.

**SECTION 7.** 227.112 of the statutes is repealed.

**Section 8.** 227.40 (1) of the statutes is amended to read:

227.40(1) Except as provided in sub. (2), the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides or has its principal place of business or, if that party is a nonresident or does not have its principal place of business in this state, in the circuit court for the county where the dispute arose. The officer or other agency whose rule or guidance document is involved shall be the party defendant. The summons in the action shall be served as provided in s. 801.11 (3) and by delivering a copy to that officer or, if the agency is composed of more than one person, to the secretary or clerk of the agency or to any member of the agency. The court shall render a declaratory judgment in the action only when it appears from the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff. A declaratory judgment may be rendered whether or not the plaintiff has first requested the agency to pass upon the validity of the rule or guidance document in question.

SECTION 9.	227.40	(2)	(intro.)	of the statutes	is	amended	to	read:
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227.40 (2) (intro.) The validity of a rule or guidance document may be determined in any of the following judicial proceedings when material therein:

**Section 10.** 227.40 (2) (e) of the statutes is amended to read:

227.40 (2) (e) Proceedings under s. 66.191, 1981 stats., or s. 40.65 (2), 106.50, 106.52, 303.07 (7) or 303.21 or ss. 227.52 to 227.58 or under ch. 102, 108 or 949 for review of decisions and orders of administrative agencies if the validity of the rule or guidance document involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered.

**SECTION 11.** 227.40 (3) (ag) of the statutes is amended to read:

227.40 (3) (ag) In any judicial proceeding other than one under sub. (1) or (2), in which the invalidity of a rule or guidance document is material to the cause of action or any defense thereto, the assertion of that invalidity shall be set forth in the pleading of the party maintaining the invalidity of the rule or guidance document in that proceeding. The party asserting the invalidity of the rule or guidance document shall, within 30 days after the service of the pleading in which the party sets forth the invalidity, apply to the court in which the proceedings are had for an order suspending the trial of the proceeding until after a determination of the validity of the rule or guidance document in an action for declaratory judgment under sub. (1).

**Section 12.** 227.40 (3) (ar) of the statutes is amended to read:

227.40 (3) (ar) Upon the hearing of the application, if the court is satisfied that the validity of the rule or guidance document is material to the issues of the case, an order shall be entered staying the trial of said proceeding until the rendition of a final declaratory judgment in proceedings to be instituted forthwith by the party asserting the invalidity of the rule or guidance document. If the court finds that the asserted

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invalidity of the rule or guidance document is not material to the case, an order shall be entered denying the application for stay.

**SECTION 13.** 227.40 (3) (b) of the statutes is amended to read:

227.40 (3) (b) Upon the entry of a final order in the declaratory judgment action, it shall be the duty of the party who asserts the invalidity of the rule or guidance document to formally advise the court of the outcome of the declaratory judgment action so brought as ordered by the court. After the final disposition of the declaratory judgment action the court shall be bound by and apply the judgment so entered in the trial of the proceeding in which the invalidity of the rule or guidance document is asserted.

**Section 14.** 227.40 (3) (c) of the statutes is amended to read:

227.40 (3) (c) Failure to set forth the invalidity of a rule or guidance document in a pleading or to commence a declaratory judgment proceeding within a reasonable time pursuant to the order of the court or to prosecute the declaratory judgment action without undue delay shall preclude the party from asserting or maintaining that the rule or guidance document is invalid.

**Section 15.** 227.40 (4) (a) of the statutes is amended to read:

227.40 (4) (a) In any proceeding pursuant to this section for judicial review of a rule or guidance document, the court shall declare the rule or guidance document invalid if it finds that it violates constitutional provisions or, exceeds the statutory authority of the agency or, was promulgated or adopted without compliance with statutory rule-making or adoption procedures, or violates s. 227.10 (2).

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