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Wisconsin Institute for Law & Liberty: How Evers' budget empowers executive, regulatory state

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The News: Last week, Governor Tony Evers released his 2019-2021 budget. WILL Deputy Counsel Lucas Vebber has analyzed the impact of his budget on state agencies and the regulatory state and found it would transform the administrative state, giving more power to unelected bureaucrats.

Background: In recent years, Wisconsin has enacted a bold regulatory reform agenda designed to increase transparency, restrain the power of unelected bureaucrats, and increase the oversight capabilities of lawmakers. Wisconsin truly led the nation in these forward-thinking reforms which include eliminating implied agency authority, passing the nation's first REINS act, and bringing an end to agency deference.

WILL's Take: WILL Deputy Counsel and Director of Regulatory Reform Lucas Vebber said, "Governor Evers' budget is a liberal-wish list on a number of levels, but an undertold story is how it would strengthen the executive branch, usurping power from the legislature. It's ironic that he calls his budget "the people's budget" when he is empowering unelected bureaucrats to make laws with less input from the public and democratically-elected legislature."

Dive Deeper: Relating to regulations and the administrative state, Governor Evers' proposes the following:

1.) Less transparency in agency decision-making

Background: Agencies use "guidance documents" to help direct internal staff on how to apply laws and regulations. Guidance documents do not have the force of law, but because they're used by agency staff they play a critical role in the regulatory process. The public has an interest in ensuring that these documents are not actually illegally issued rules in violation of Chapter 227 of the statutes.

Governor's Budget: The Governor's budget repeals the requirements to publish guidance documents, accept public comments, and keep documents posted on agency websites. It also eliminates the requirement that agency heads certify that guidance documents comply with Chapter 227.

WILL's Take: Evers seeks to repeal good government transparency measures. These measures help the regulated community and the general public better understand how government operates, and help guarantee that agencies are only acting within their proper statutory and administrative authority.

2.) Bringing back "Sue and Settle"

Background: Notorious during the Obama Administration, special interest groups and willing government agencies often engage in a process known as "sue and settle." When this occurs, the special interest will sue the agency seeking a regulatory change, the agency will agree to the change, and then a court signs off on a settlement agreement mandating the change.

In Wisconsin, a settlement agreement, consent decree, or court order cannot confer any rulemaking authority upon an agency, and agencies are prohibited from agreeing to promulgate rules unless the agency has explicit statutory authority to promulgate the rule – thus preventing most of the harm that can come from the "sue and settle" process.

Governor's Budget: The Governor's budget proposes to repeal these statutory prohibitions, which would return Wisconsin back to a time of "sue and settle" regulations.

WILL's Take: This process is an end-run around the legislature's authority to

delegate regulatory power to agencies. Repealing these prohibitions would allow special interest groups to legally bind state agencies to engage in rulemaking that state law may not otherwise allow.

3.) Ceding state power to the federal government

Background: Many federal laws impose requirements upon states. States often have to submit “implementation plans” to the federal government showing how the states intend to comply.

Wisconsin law, generally, requires that in order for a state agency to act, it must have state authority. State law also explicitly provides that federal plans do not confer rulemaking authority, and that no state agency may agree to promulgate a rule as part of a federal implementation plan unless they have explicit statutory authority to do so.

Governor’s Budget: The Governor’s budget proposes the repeal of these statutory prohibitions on what can and cannot be included in a federal implementation plan.

WILL’s Take: State agencies do not get their authority from the federal government, they get it from the people of Wisconsin. This proposal from the Governor cedes some control of state agencies to the federal government.

4.) Creating uncertainty over agency deference in interpretations of law.

Background: Traditionally, when a term in a statute or a regulation was ambiguous, a court would defer to the government agency’s interpretation of such a term when deciding on the case. This tips the scale of justice to the government in disputes between the people and agencies.

Last year the Wisconsin Supreme Court held that courts will no longer defer to agency interpretations of laws. The Legislature followed that up by specifically providing that no agency may seek deference on an interpretation of law, and further, that courts shall accord no deference to an agency’s interpretation of law.

Governor’s Budget: The Governor’s budget proposes a repeal of these statutory provisions, but not make additional changes – presumably leaving in place the Wisconsin Supreme Court’s previous holding that it would not give great weight deference to agency decisions.

WILL's Take: These statutory provisions, that the Governor is seeking to remove, help level the playing field and ensure that courts determine what laws mean, not government bureaucrats. Repealing these provisions will do nothing except create additional uncertainty, especially in light of the Wisconsin Supreme Court's holding last year.