
Wisconsin Legislative Council



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Director

TO: REPRESENTATIVE MICHAEL SCHRAA

FROM: Andrea Brauer, Staff Attorney

RE: Proposed Winnebago County Ordinance Related to COVID-19

DATE: June 22, 2020

At your request, this memorandum provides a description of the authority that proposed Winnebago County Ordinance #027-062020 (“the ordinance”)¹ grants to the Winnebago County health officer and an analysis of potential grounds for legal challenges related to these powers. Pursuant to s. 251.06 (3) (c), Stats., the Winnebago County health officer must enforce any county ordinances that are consistent with state public health statutes and rules.

The ordinance does the following: (1) codifies all of the local health officer’s statutory powers related to control of communicable diseases in s. 252.03, Stats.; (2) codifies most of the Department of Health Services’ (DHS) statutory powers related to control of communicable diseases in s. 252.02, Stats.; and (3) grants the Winnebago County health officer a number of additional explicit powers. Each of these is described in more detail below.

CODIFICATION OF THE LOCAL HEALTH OFFICER’S STATUTORY POWERS

First, the ordinance codifies the statutory powers of the local health officer by incorporating the language in s. 252.03, Stats. Winnebago County officials have asserted that, following the Wisconsin Supreme Court decision in *Wisconsin Legislature v. Palm*, 2020 WI 42, the county health officer would not otherwise have authority to enforce local orders issued pursuant to s. 252.03, Stats.² As described below, while *Palm* did not explicitly hold that the local health officer’s powers must be codified in ordinance, a local government may nevertheless determine that it is advisable to do so.

¹ A copy of the ordinance is available here:

<https://www.co.winnebago.wi.us/sites/default/files/CountyClerk/OtherDocuments/027-062020.pdf>. See also the discussion of the ordinance during the June 16, 2020 Winnebago County Board meeting, available here: <https://www.youtube.com/watch?v=SCa7sIRDNv4&feature=youtu.be&list=PLqRylHmMyMnfOOqfDO961PATjR4MLL1rRt&t=4598>.

² Currently, Winnebago County ordinances do not codify the local health officer’s powers in s. 252.03, Stats., and instead only explicitly require that the county health officer perform certain general duties that are prescribed in s. 251.06 (3), Stats., referencing the 1993 statutes. [Winnebago County, Wis., *Gen. Ordinances* s. 11.08 (2) (a).]

Local Health Officer's Statutory Powers

A local health officer has broad statutory authority to respond to communicable diseases within the local health department's jurisdiction, pursuant to s. 252.03, Stats., which states that a local health officer may:

- Investigate the circumstances of any communicable disease, which appears within his or her territory.
- Take all measures necessary to prevent, suppress, and control communicable diseases.
- Inspect schools and other public buildings within his or her jurisdiction as needed to determine whether the buildings are kept in a sanitary condition.
- Do what is reasonable and necessary for the prevention and suppression of disease.
- Forbid public gatherings when deemed necessary to control outbreaks or epidemics.

Both DHS and the local health officer (or the local health officer's designee) may also obtain a special inspection warrant, pursuant to s. 66.0119, Stats., for the purpose of inspecting both personal and real private property for health and safety purposes. [ss. 66.0119 and 252.02 (1), Stats.]

Effect of *Palm* on Local Authority

Palm raised a number of questions regarding local authority related to control of communicable diseases. However, it is important to note that *Palm* did not actually analyze local health officer authority under s. 252.03, Stats. Instead, *Palm* analyzed whether DHS had authority under s. 252.02, Stats., to impose Emergency Order #28 (the statewide "Safer at Home" order). As described in more detail below, ss. 252.02 and 252.03, Stats., bear important similarities but are not identical.

Specifically, *Palm* concluded that Emergency Order #28 was invalid because: (1) the order met the definition of a "rule" and was subject to the rulemaking procedures under ch. 227, Stats., which DHS had not followed; and (2) certain aspects of the order exceeded DHS's authority in s. 252.02, Stats. In addition, *Palm* held that criminal penalties may not be imposed against a person for criminal conduct the elements of which are defined solely by a government order, as opposed to a properly promulgated administrative rule.

Although none of these holdings explicitly apply to local actions, *Palm* does provide guidance regarding how the Wisconsin Supreme Court might analyze s. 252.03, Stats. In response to a flurry of local actions following *Palm* and guidance from the Wisconsin Counties Association, Attorney General Kaul issued an emergency opinion stating, among other things, that based on *Palm*'s statements about criminal sanctions "[i]t is advisable [for local governments] to limit enforcement under Wis. Stat. § 252.03 to ordinances or administrative enforcement." [OAG-03-20, at ¶15.]³ In addition to the concerns raised by the attorney general, the statutes also do not directly authorize local governments to impose criminal penalties for a violation of a local health officer's order. Instead, pursuant to the penalty provision in s. 252.25, Stats.:

Any person who willfully violates or obstructs the execution of any state statute or rule, **county, city or village ordinance** or [DHS] order under this chapter and relating to

³ The Wisconsin Counties Association guidance is available at:
<https://files.constantcontact.com/77ea05ac001/b8b53666-6353-449b-833a-965b3a3f5b3c.pdf>.

the public health, for which no other penalty is prescribed, shall be imprisoned for not more than 30 days or fined not more than \$500 or both. [Emphasis added.]

Thus, if a local government intends for criminal penalties to apply to a violation of a local health officer's order, the elements of the crime arguably must be codified in either state statute or rule, or local ordinance. This issue is not, however, directly relevant to the proposed Winnebago County ordinance, which provides for civil rather than criminal penalties. Specifically, under the ordinance, a person who violates a local health officer's order could be subject to a civil forfeiture, injunctive relief, or suspension of a local license or permit. [Ordinance s. 11.04 (8).]

Neither *Palm* nor the attorney general opinion otherwise explicitly require that a local government codify the local health officer's powers into ordinance. However, a local government may determine that it is nevertheless advisable to do so, for the purpose of avoiding an argument that a local ordinance should be viewed as analogous to an agency rule under *Palm*'s analysis. For example, one of *Palm*'s practical concerns was that if the rulemaking process does not apply, the statutes allow too much "subjective judgment asserted by one unelected official." [*Palm*, at ¶28]. A local government could choose to explicitly incorporate the local health officer's powers into local ordinance, for the purpose of expressing its approval of those actions.

INCORPORATION OF DHS' STATUTORY POWERS

Second, the ordinance grants the Winnebago County health officer the majority of DHS's powers related to control of communicable diseases by incorporating most of the language in s. 252.02, Stats.⁴ As described below, these parts of the ordinance could be subject to a preemption challenge, in particular with regard to the authority to close schools and prohibit gatherings in churches.

Background: Comparison of DHS and Local Powers

A local health officer has broad statutory authority to respond to communicable diseases within the local health department's jurisdiction, pursuant to s. 252.03, Stats. This statute bears important similarities to DHS's authority to respond to communicable diseases, pursuant to s. 252.02, Stats. For example, similar to DHS's power to "authorize and implement all emergency measures necessary to control communicable disease", a local health officer may "take all measures necessary to prevent, suppress and control communicable diseases" and may "do what is reasonable and necessary for the prevention and suppression of disease." [ss. 252.02 (6) and 252.03 (1) and (2), Stats.] In addition, both statutes are enforceable under s. 252.25, Stats., which provides criminal penalties for violation of a DHS or local order.

The statutes are not, however, identical. DHS is granted a list of explicit powers that do not appear in s. 252.03, Stats. Most relevant to a preemption analysis, the statutes provide that DHS is authorized to "close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics," whereas the local health officer is authorized to "forbid public gatherings when deemed necessary to control outbreaks or epidemics." [ss. 252.02 (3) and 252.03 (2), Stats.] *Palm* also explicitly upheld DHS's power to close schools for the remainder of the 2019-20 school year, carving out school closures from its decision to strike the rest of Emergency Order #28. [*Palm*, at p.3, fn. 6.]

⁴ The ordinance incorporates all of s. 252.02, Stats., except for the parts that clearly do not apply to local governments, such as DHS's authority to take actions related to jails, state prisons, and mental health institutions.

Preemption of Local Authority: Closing Schools and Churches

The most likely grounds for a preemption challenge relates to s. 11.08 (4) (f) of the ordinance, which authorizes the Winnebago County health officer to “close schools and forbid public gatherings in schools, churches ..., and other places when deemed necessary to control outbreaks, epidemics or pandemics.” As cited above, this language is taken verbatim from the statutes that outline DHS’s powers but does not appear in the statutes that outline local powers. It could be argued that local action is thereby preempted because the Legislature explicitly chose to grant these additional powers to DHS rather than to the local health officers.

The first step in a preemption analysis is to determine whether the issue is a matter of statewide concern. The Legislature has explicitly stated that it finds the provision of public health services in Wisconsin to be a matter of statewide concern. [s. 251.001, Stats.] When the state legislates on a matter of statewide concern, that legislation preempts a local ordinance if: (1) the Legislature has expressly withdrawn the power of municipalities to act; (2) the municipality’s actions logically conflict with the state legislation; (3) the municipality’s actions defeat the purpose of the state legislation; or (4) the municipality’s actions are contrary to the spirit of the state legislation. [*Anchor Savings & Loan Association v. Madison EOC*, 120 Wis. 2d 391, 397 (1984); *Black v. City of Mke.*; 2016 WI 47.]

Here, the Legislature has not expressly withdrawn the authority of a local health officer to close schools or prohibit gatherings in churches, and a local health officer could seek to issue such an order under his or her broad authority to take “all measures necessary” to control the spread of communicable diseases and to prohibit public gatherings. [s. 252.03 (1) and (2), Stats.] However, a court could find that the plain language of the statutes evidences the Legislature’s intent to grant DHS, rather than local officials, the authority to close schools and prohibit gatherings in churches. Courts must presume that a Legislature says in a statute what it means, and “statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” [*Kalal v. Circuit Court for Dane County*, 2004 WI 58, at ¶46.] It is also a cardinal rule of statutory construction that when a general and a specific statute relate to the same subject matter, the specific statute controls. [*Martineau v. State Conservation Com.*, 46 Wis. 2d 443, 449 (1970).] The Legislature could have specified that both the local health officer and DHS may close schools and forbid gatherings in churches but it did not do so. Thus, allowing a local health officer to close schools and churches when DHS has chosen to allow them to remain open arguably conflicts with and frustrates the purpose or spirit of state law.⁵

ADDITIONAL POWERS RELATED TO PRIVATE GATHERINGS AND PLACES OF EMPLOYMENT

Finally, the ordinance grants the Winnebago County health officer the following additional authority, which the statutes do not explicitly grant to either the local health officer or to DHS: (1) prohibiting private gatherings when deemed necessary to control outbreaks, epidemics, or pandemics; and (2) forbidding public gatherings in places of employment and private property when deemed necessary to control outbreaks, epidemics, or pandemics. [Ordinance ss. 11.08 (4) (f) and (h).]

In comparison, s. 252.03, Stats., only explicitly provides that local health officers may prohibit **public** gatherings and does not grant specific authority relating to the regulation of private gatherings or places

⁵ This may also be the case for any other parts of s. 252.02, Stats., that aren’t incorporated into s. 252.03, Stats.

of employment. A court could find, under the same principles of statutory construction discussed above, that the statutes do not authorize local health officers to prohibit private gatherings and regulate places of employment because if the Legislature had intended to allow such local orders it would have said so.

These provisions are also especially problematic following *Palm*, which held that DHS's order "confining all people to their homes, forbidding travel and closing businesses" exceeded DHS's authority in s. 252.02, Stats. [*Palm*, at ¶59.] *Palm* also concluded that DHS did not have the authority to prohibit all private gatherings of people not living within the same household, because the directive was not based on persons infected or suspected of being infected. [*Id.*, at ¶49-50 (characterizing the prohibition of private gatherings as "obvious overreach").]

The restrictions authorized under Winnebago County's proposed ordinance are less far-reaching than the restrictions in Emergency Order #28. They may, therefore, be distinguishable from the court's analysis in *Palm*, which analyzed the powers exercised by DHS in the aggregate. *Palm* may, however, still provide a basis for a challenge to local attempts to prohibit private gatherings and restrict gatherings at places of employment.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

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