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# Wisconsin Legislative Council



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Director

TO: REPRESENTATIVE KATRINA SHANKLAND

FROM: Anna Henning, Senior Staff Attorney

RE: Local and Private Authority to Enact and Enforce Face Covering Requirements

DATE: January 29, 2021

You requested an overview of local government authority to enact and enforce local face covering requirements, particularly if the Assembly were to pass without amendment [Senate Joint Resolution 3](#) (“SJR 3”).<sup>1</sup> You also asked about SJR 3’s effect on the ability of a private business to impose a face covering requirement for its employees or patrons.

SJR 3, would revoke [Executive Order 104](#), in which the Governor declared a state of emergency relating to the COVID-19 pandemic.<sup>2</sup> In effect, SJR 3 also would invalidate [Emergency Order 1](#), which is dependent on the existence of a declared state of emergency. Emergency Order 1 requires, with limited exceptions, face coverings to be worn throughout the state.

As described below, SJR 3 would have no direct effect on either local government authority to require face coverings, nor on private businesses’ ability to do so. Local governments might rely on one of several sources of authority, summarized below, to require face coverings, and private businesses generally may impose such requirements on property within their control. Many local governments had enacted such requirements before Emergency Order 1 was issued.<sup>3</sup> However, certain legal constraints, described below, may apply in some circumstances.

## EFFECT ON LOCAL AUTHORITY

SJR 3 does not directly affect local authority regarding face coverings, and such local authority is generally not dependent on the Governor’s declaration of a state of emergency.<sup>4</sup> However, by removing the statewide mandate, SJR 3 would have the effect of transferring to the local level decisions regarding whether to require face coverings.

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<sup>1</sup> The Senate passed SJR 3 on January 26, 2021.

<sup>2</sup> Section 323.10, Stats., authorizes the Legislature to revoke a state of emergency by joint resolution.

<sup>3</sup> See Legislative Reference Bureau, *LRB Survey of Local Government COVID-19 Orders and Penalties* (Oct. 2020), [https://docs.legis.wisconsin.gov/misc/lrb/lrb\\_reports/local\\_covid\\_19\\_orders\\_4\\_14.pdf](https://docs.legis.wisconsin.gov/misc/lrb/lrb_reports/local_covid_19_orders_4_14.pdf).

<sup>4</sup> However, during a state of emergency declared by the Governor, a local government may employ certain personnel, facilities, and other resources consistent with a local emergency management plan. A local head of emergency management may also contract with any person to provide equipment and services on a cost basis to be used to respond to a disaster, or the imminent threat of a disaster. [s. 323.14 (3) and (4), Stats.]

As described in more detail below, counties, cities, villages, and towns (“local governments”) all have relatively broad authority to address public emergencies and enact ordinances to address matters of public health. In addition, local health departments have relevant powers relating to controlling the spread of communicable disease. However, depending on the circumstances, exercise of that authority may be subject to certain legal constraints.

## **Sources of Authority for Local Face Covering Requirements**

A local government might rely on one of several sources of authority to enact and enforce a face covering requirement, none of which would be directly affected by SJR 3. Those potential sources of authority include: (1) local governing bodies’ statutory authority to declare and address local emergencies under ch. 323, Stats.; (2) local health officers’ statutory authority to address the spread of communicable disease under ch. 252., Stats.; and (3) general police powers. In practice, most of the local face covering requirements enacted to date rely on the second of those three sources of authority.

### **Local Emergency Declarations**

A local government’s governing body (e.g., a city’s common council or a town, village, or county board) may declare a local emergency by ordinance or resolution, whenever conditions arise by reason of a riot or civil commotion, a disaster, or an imminent threat of disaster that impairs transportation, food or fuel supplies, medical care, fire, health, or police protection, or other critical systems of the local unit of government. The length of the emergency must be limited by the ordinance or resolution to the time during which the emergency conditions exist or are likely to exist. [s. 323.11, Stats.]

Once an emergency is declared, a local governing body may order “whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local government in the emergency.” [s. 323.14 (4) (a), Stats.]

### **Local Health Officials’ Authority to Control Contagious Disease**

Whether or not a local emergency has been declared, the chapter of the statutes relating to control of communicable diseases provides relevant authority to local health officers.<sup>5</sup> Specifically, local health officers must “promptly take all measures necessary to prevent, suppress and control communicable diseases.” Along with certain other, more specific powers relating to the control of communicable disease, local health officers also have general authority to “do what is reasonable and necessary for the prevention and suppression of disease.” [s. 252.03 (1) and (2), Stats.]

### **General Police Powers**

Very generally, local governments may exercise police powers to regulate public health, safety, and welfare, unless preempted from doing so by state law. Wisconsin Constitution, Article XI, Section 3, provides that cities and villages “may determine their local affairs and government, subject only to [other provisions of the Wisconsin] Constitution and such enactments of the Legislature of statewide concern as with uniformity shall affect every city or every village.” Towns generally may adopt village

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<sup>5</sup> Although “local health officer” is not specifically defined in that chapter, it seems reasonable to conclude that such officers include the officers of local health departments. A county health department typically serves as the “local health department,” except that in certain jurisdictions a health department established by a city, town, village, or two or more municipalities may serve as the local health department. [ss. 250.01 (4) and 251.02, Stats.] Generally, each county (other than Milwaukee County) must establish a county health department. A county health department may be organized as a single-county health department, a city-county health department jointly with the governing body of a city, or a multi-county health department in conjunction with another county.

powers and therefore exercise the police powers described above, except where such powers conflict with statutes. [ss. 60.10 (2) (c) and 60.22 (3), Stats.] Counties have a more limited “administrative home rule” over organizational and administrative matters, subject only to the Wisconsin Constitution and to any enactment of the Legislature which is of statewide concern and which uniformly affects every county. [s. 59.03, Stats.]

## Potential Legal Constraints

Despite the broad grants of authority described above, local governments’ enactments and orders may be subject to certain legal constraints. In *Wisconsin Legislature v. Palm*, 2020 WI 42, the Wisconsin Supreme Court interpreted state authority to take certain actions to address the COVID-19 pandemic. The opinion did not directly discuss local authority to address the pandemic. However, the decision has potential implications for local requirements, particularly those that rely on statutory authority under ch. 252, Stats., because the broad local authority provisions in that chapter are similar to provisions that the Court interpreted narrowly in the context of a state public health order.

The *Palm* Court held, in part, that a narrow construction of the statute was required to avoid constitutional questions that might otherwise arise as a result of a broad interpretation of the authority of the Department of Health Services (DHS). Some of the same constitutional considerations could arguably apply to a local face covering requirement. However, a local requirement could also be distinguished as having a less intrusive or restrictive effect than the travel restrictions, business closures, and stay-at-home requirements at issue in *Palm*.

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].<sup>6</sup> It is also notable that the criminal penalties provided in s. 252.25, Stats., apply to violations of local ordinances but may not necessarily apply to violations of local orders, unless a person who violates a local order is deemed to have obstructed the execution of state statutes or rules. In addition, municipalities cannot generally create crimes that are not otherwise authorized by state law. [*State v. Thierfelder*, 174 Wis. 2d 213 (1993); s. 939.12, Stats.]

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.

*Palm* also arguably indicated that the broad powers in ch. 252, Stats., could be considered an improper delegation of legislative authority to public health officials. For example, one of the practical concerns expressed in *Palm* 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 seek to address this concern by providing for legislative oversight in a manner that is similar to the agency rulemaking procedures in ch. 227, Stats. This could be accomplished by, for example, explicitly incorporating the local health officer’s powers or orders into local ordinance or requiring that any general orders of the local health officer be subject to review by the local governing body or by a particular local official or committee.

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<sup>6</sup> The Wisconsin Counties Association guidance is available at:  
<https://files.constantcontact.com/77ea05ac001/b8b53666-6353-449b-833a-965b3a3f5b3c.pdf>.

Neither *Palm* nor the attorney general opinion otherwise explicitly requires that a local government codify the local health officer's powers into ordinance. However, for the reasons stated above, a local government may determine that it is nevertheless advisable to do so.

Finally, the Americans with Disabilities Act (ADA) or other civil rights laws may affect a local government's ability to enforce a face covering requirement with respect to an individual with a disability or other protected circumstance, depending on the situation.

## **EFFECT ON PRIVATE BUSINESS AUTHORITY**

SJR 3 would not affect the ability of a private business to require its employees or patrons to wear face coverings on private property controlled by the business. In addition, the implications of the *Palm* decision, described above, would be largely inapplicable to a requirement imposed by a private business. Thus, after the passage of SJR 3, a business may decide to adopt a face covering requirement for its employees or patrons on property under its control.

However, a business may wish to seek legal advice regarding the application of a requirement to any employee or patron who seeks an accommodation under the ADA or another state or federal nondiscrimination law.

Please let me know if any additional information would be useful.

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