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# Wisconsin Legislative Council



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Director

TO: REPRESENTATIVE KATRINA SHANKLAND

FROM: Steve McCarthy, Senior Staff Attorney

RE: Local Authority Related to COVID-19 Within Portage County

DATE: September 8, 2021

You asked for a description of local authority to respond to communicable disease outbreaks and epidemics, such as the COVID-19 pandemic. As described below, each area of the state has a local health department led by an appointed local health officer, who has broad authority to act and impose orders throughout the areas within the local health department's jurisdiction. Local units of government can also act concurrently to address public health issues, including through emergency management and local police powers. Despite these broad grants of authority, local governments' enactments and orders may be subject to certain legal constraints, including a decision by the Wisconsin Supreme Court that explicitly prohibits a local health officer from closing schools under its authority to control communicable diseases.

## LOCAL HEALTH DEPARTMENTS AND LOCAL HEALTH OFFICERS

Each part of the state is subject to the jurisdiction of a local health department. Over time, state law has been amended to provide that generally the county health department serves as the "local health department" in most areas of the state, although there are a number of exceptions. A county health department can be established as a single or multiple county health department or as a city-county health department. Because the scope of a local health department's authority and the role of the local health officer varies depending on a number of factors, this memorandum only discusses the authority within Portage County.<sup>1</sup>

### Portage County Health Department

In your district, [Portage County](#) has a single county health department, referred to as Portage County Health & Human Services, which is funded by the county board. Because no city, village, or town within

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<sup>1</sup> A local health department can be organized by the county, city, village, or town and can also be established as a joint department between multiple units of local government. Local health departments are regulated differently based on a number of factors, including when the department was created, whether the department is established at the county level or by a different unit of local government, whether the county has a county administrator or county executive, and whether the department is a joint department subject to an agreement between the members. While all counties other than Milwaukee County have a county health department, state law still recognizes the independent authority of certain health departments established by cities, towns, villages, or two or more municipalities. In addition, in Milwaukee County, the local health department must be a city, village, or multiple municipal health department. [ss. 251.02 and 251.08, Stats.]

Portage County has a separate health department, the jurisdiction of Portage County Health & Human Services extends to the entire county. [ss. 251.02 (1), 251.08, and 251.10, Stats.]

Generally, local health departments are governed by a local board of health, which consists of up to nine appointed members. However, in counties that have a county executive and a single county health department, including Portage County, the local board of health is considered only a policy-making body that determines the broad outlines and principles governing its administration, and instead the county executive may assume the powers and duties of the local board of health.<sup>2</sup> Those powers and duties include, for example, developing public health policies and procedures for the community and adopting regulations for the governance of the local health department that are necessary to protect and improve public health. Such regulations may be no less stringent than, and may not conflict with, state statutes and rules of the Department of Health Services (DHS). [ss. 251.04 (3) and 251.05 (3) (b), Stats.] DHS can also delegate additional powers to local health departments to achieve statewide health objectives as DHS considers appropriate. [s. 250.03 (1) (e), Stats.]

## **Portage County Health Officer**

Each local health department has a “local health officer” who is in charge of the local health department and performs the duties prescribed by the local board of health. [s. 251.06 (3) (h), Stats.] In counties that have a county executive and a single county health department, including Portage County, the local health officer is appointed and supervised by the county executive and is subject to confirmation by the county board, unless the county board elects to waive confirmation or the appointment is made under a civil service system.<sup>3</sup> The statutes specify that the county health officer in such a county is subject only to the supervision of the county executive. [s. 251.06 (4) (b), Stats.] The county executive can also remove the local health officer at pleasure, unless a county ordinance provides otherwise or the local health officer is subject to a civil service law. [s. 17.10 (6) and (7), Stats.]

Local health officers have broad powers and responsibilities related to controlling communicable diseases. State law requires a local health officer to “promptly take all measures necessary to prevent, suppress and control communicable diseases” when they appear in the community. A local health officer also has general authority to “do what is reasonable and necessary for the prevention and suppression of disease” and may “forbid public gatherings when deemed necessary to control outbreaks or epidemics.” The Portage County health officer relied on this authority in issuing [COVID-19 Order #1](#) on May 15, 2020. [s. 252.03 (1) and (2), Stats.]

In addition, a local health officer may direct persons who are suspected of having a contagious medical condition to cease and desist in conduct or employment which constitutes a threat to others, or to reside in an isolated or segregated setting which decreases the danger of transmission. When real or personal property or animals or their environs present a threat of transmission of any communicable disease, a local health officer may direct persons who own or supervise the property to do what is reasonable and necessary to abate a threat of transmission. [s. 252.06, Stats.; and s. DHS 145.06 (6), Wis. Adm. Code.]

Local health officers are also required to enforce any regulations that the local board of health (or, in Portage County, the county executive acting as the local board of health) adopts and any ordinances

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<sup>2</sup> Note that this is not the case in other local health departments, including in counties that have a joint county health department or counties that have a county administrator.

<sup>3</sup> The appointing authority varies depending on the type of health department. For example, in city and village health departments, the local health officer is appointed by either the chief executive officer or the local board of health, depending on the city or village. [ss. 251.03 and 251.06 (4), Stats.]

that the relevant governing body enacts, if they are consistent with state public health statutes and rules. In addition, local health officers must report to DHS and the appropriate governing body about the progress of any communicable disease and must describe the local efforts to control the disease. [ss. 251.06 (3) (c) and 252.03 (1), Stats.]

In sum, Portage County's local health department and local health officer have jurisdiction throughout all of Portage County. The local health officer's activities are subject to supervision by the county executive but not by the county board or the other units of local government within the county. The county board can enact ordinances that the local health officer is required to enforce but those ordinances may not limit the local health officer's statutory powers. The county board may also have some additional leverage through its control of the health department's funding.

## **OTHER LOCAL GOVERNMENT POWERS**

Local governments may also act concurrently to address public health issues, including through emergency management and local police powers.

### **Local States of Emergency**

Many local governments have declared local states of emergency in response to COVID-19. A county, city, village, or town may declare a local state of emergency 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 government. A "disaster" is defined to include a severe or prolonged occurrence "that threatens or negatively impacts life, health, property... [or] the security of this state or a portion of this state." The length of the emergency must be limited to the time during which the emergency conditions exist or are likely to exist. [ss. 323.02 (6) and 323.11, Stats.]

During a declared state of emergency, a local government may order, by ordinance or resolution, "whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government in the emergency." The local government also has explicit authority to "bar, restrict, or remove all unnecessary traffic, both vehicular and pedestrian, from the highways." [s. 323.14 (4), Stats.] The statutes also provide that during a declared state of emergency, the role of any state agency is to assist units of government and law enforcement agencies in responding to the disaster or the imminent threat of disaster, unless specified otherwise by law. [s. 323.01 (2), Stats.]

Generally, a local state of emergency must be declared by ordinance or resolution. However, if the local governing body is unable to meet promptly, because of the emergency conditions, the chief executive officer (such as the mayor, village president, town board chairperson, etc.) may declare a state of emergency and exercise the emergency powers of the local unit of government by proclamation. The exercise of powers by the chief executive officer must be limited to actions that appear necessary and expedient. A proclamation remains valid subject to ratification, modification, or repeal by the governing body as soon as that body can meet. [s. 323.14 (4) (b), Stats.]

### **Police Powers**

A local government seeking to impose local restrictions in response to COVID-19 may also rely on others sources of local authority, including local police powers. The authority for a municipality to enact a particular ordinance under its police powers is fact-specific and would need to be analyzed on a case-by-case basis to determine whether local action is preempted by state law. In addition, s. 252.04 (4), Stats., specifically states that any order issued by DHS under that statute for the purpose of controlling

communicable diseases supersedes any conflicting or less stringent local regulations, orders, or ordinances.

The Wisconsin Constitution 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.” [Wis. Const. art. XI, s. 3.] The statutes further provide that cities and villages “shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public” under their local police powers and “may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means.” [ss. 61.34 (1) and 62.11 (5), Stats.] Towns that adopt village powers can exercise the local police powers granted by statute to cities and villages, 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” authority 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.] This administrative home rule power is more limited than the home rule power afforded to cities and villages. [*Jackson County v. Department of Natural Resources*, 2006 WI 96 at ¶ 17.] Counties also have general authority to “enact and enforce ordinances to preserve the public peace and good order within the county.”<sup>4</sup> [s. 59.54 (6), Stats.]

As a general rule, local governments can act under the above sources of authority as long as local action is not preempted by state law. To withstand a preemption challenge, the local government must show that the local regulation addresses a matter of local concern and is not preempted by a uniform state law. [*Black v. City of Mke.*; 2016 WI 47.] A uniform state law preempts local regulation 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).]

In conclusion, there are a number of ways in which local governments and officials could act in light of the COVID-19 pandemic. In Portage County, the county executive oversees the local health department and local health officer but the county and the other local government units within Portage County may still have some independent authority to enact ordinances related to emergency management or local police powers.

## POTENTIAL LEGAL CONSTRAINTS

Despite the broad grants of authority described above, local health officer authority may be subject to certain legal constraints.

### ***Wisconsin Legislature v. Palm***

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

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<sup>4</sup> For example, a proposed ordinance in [Marathon County](#) relied upon the county’s police powers in s. 59.54 (6), Stats.

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 DHS. Some of the same constitutional considerations could arguably apply to a local enactment or order. However, a local requirement that does not involve the travel restrictions, business closures, and stay-at-home requirements at issue in *Palm* could also be distinguished as having a less intrusive or restrictive effect.

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>5</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.

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.

### ***James v. Heinrich***

Additionally, in *James v. Heinrich*, 2021 WI 58, which involved a challenge to a local health officer's order to prohibit in-person schooling for public and private schools, the Wisconsin Supreme Court held, among other things, that a local health officer does not have the statutory power to close schools under s. 252.03, Stats. The *Heinrich* Court noted that because the statute did not give local health officers the authority to "close schools," but did explicitly grant that authority to DHS under s. 252.02, Stats., a local health officer may not close schools.

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<sup>5</sup> The Wisconsin Counties Association guidance is available at: <https://files.constantcontact.com/77ea05ac001/b8b53666-6353-449b-833a-965b3a3f5b3c.pdf>.

Because *Heinrich* is the only Wisconsin Supreme Court case to address local authority to address the COVID-19 pandemic, and the case answered only the specific question of whether a local health officer may close schools, other legal challenges could further clarify whether local authority to address the COVID-19 pandemic is limited in any other ways. For example, though the Supreme Court declined to exercise its original jurisdiction as requested by the petitioners, a recent challenge was filed against a mask mandate issued in Dane County. The petitioners argued, in part, that the order exceeds the local health officer's statutory authority under ch. 252, Stats., as interpreted by the Wisconsin Supreme Court in *Heinrich*.

Please let me know if I can provide any further assistance.

SM:jal