
Wisconsin Legislative Council



Anne Sappenfield
Director

TO: SENATOR DAVID CRAIG

FROM: Melissa Schmidt, Senior Staff Attorney

RE: Religious Services Conducted Outside During the Mass Gathering Ban and the Safer at Home Order

DATE: April 8, 2020

You have asked whether it is permissible under Emergency Order #8, the updated mass gathering ban, and Emergency Order #12, also known as the “Safer at Home” order, for a religious service, including a drive-up religious service, to be held outside. This memorandum is prepared in response to your request.

For reference, Emergency Order #8 was ordered by the Department of Health Services (DHS) on March 20, 2020, and remains in effect for the duration of the public health emergency declared in Executive Order #72¹, issued by Governor Tony Evers, or until superseded by another order. Emergency Order #12 was ordered by DHS on March 24, 2020, and is in effect until 8:00 a.m. on Friday, April 24, 2020. Emergency Order #12 appears to temporarily supersede all other emergency orders in conflict with it. As of the date of this memorandum, it appears that Emergency Order #8 is superseded by Emergency Order #12, and then will go back into effect at 8:00 a.m. on Friday, April 24, 2020.

Also, cities, villages, and towns (local units of government) have explicit statutory authority to declare a public health emergency on their own initiative and to do “whatever is necessary and expedient” for the health of persons and property within their jurisdictions. [ss. 323.11 and 323.14 (4) (a), Stats.] However, the extent to which any local order may be inconsistent with an emergency order issued by DHS (e.g., more strict or less strict than Emergency Orders #8 or #12), will depend upon how a court will apply past preemption cases to any preemption challenge to a local order.

EMERGENCY ORDER #8

Emergency Order #8² was issued by DHS in response to the spread of the COVID-19 disease. The order limits, and in some cases prohibits, gatherings and activities that are otherwise permissible. The order

¹ The public health emergency declared in Executive Order #72 will expire on May 11, 2020, if the Legislature does not approve an extension.

² Emergency Order #8 may be viewed in its entirety at: https://docs.legis.wisconsin.gov/code/register/2020/771A4/register/emergency_orders/phe_2020_emergency_order_08/phe_2020_emergency_order_08. The first order to prohibit mass gatherings of 10 people or more was Emergency Order #5, however it is superseded by Emergency Order #8. Emergency Order #5 may be viewed in its entirety at:

is enforced at the discretion of local law enforcement, and any violation or obstruction of the order is punishable by up to 30 days imprisonment, up to a \$250 fine, or both. As previously mentioned, it appears that Emergency Order #12 temporarily supersedes Emergency Order #8; when Emergency Order #12 terminates at 8:00 a.m. on April 24, 2020, Emergency Order #8 will again be in effect for the duration of Executive Order #72 or until superseded by another order.

As it relates to your specific inquiry, Emergency Order #8 prohibits any “mass gathering,” which it defines as “any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together 10 or more people in a single confined or enclosed space³, whether inside or outside, at the same time.”

Under Emergency Order #8, any gathering that brings together or is likely to bring together less than 10 people in a single room or confined or enclosed space, whether inside or outside, must do both of the following: (1) preserve social distancing of at least six feet between people and avoid all direct physical contact; and (2) follow all other public health recommendations issued by DHS and the U.S. Centers for Disease Control (CDC).

EMERGENCY ORDER #12

Emergency Order #12⁴ was also issued by DHS in response to the spread of the COVID-19 disease. The order curtails, and in some cases prohibits, activities that are otherwise permissible. Similar to Emergency Order #8, Emergency Order #12 is enforced at the discretion of local law enforcement, and any violation or obstruction of the order is punishable by up to 30 days imprisonment, up to a \$250 fine, or both. As it relates to your specific inquiry, the order provides that all nonessential businesses and operations, except essential businesses and operations, must cease activities within Wisconsin, effective at 8:00 a.m. on Wednesday March 25, 2020, until 8:00 a.m. on Friday, April 24, 2020.

Under Emergency Order #12, all “essential businesses and operations” are expressly encouraged to remain open and are required, to the greatest extent feasible, to comply with the social distancing requirements between all individuals on the premises to the extent possible. Religious facilities, groups, and gatherings, and weddings and funerals are specifically included in the “definition of essential businesses and operations.”

Related to religious services, Emergency Order #12 requires that in all circumstances, individuals at a religious service must adhere to the following social distancing requirements as much as possible: (1) maintaining social distancing of six feet between people, except that this does not apply to family members living in a single living unit or household members; (2) washing hands with soap and water for at least 20 seconds as frequently as possible or using hand sanitizer; (3) covering coughs or sneezes (into the sleeve or elbow, not hands); (4) regularly cleaning high-touch surfaces; (5) not shaking hands; and (6) following all other public health recommendations issued by DHS and the CDC. In addition, if

https://docs.legis.wisconsin.gov/code/register/2020/771A4/register/emergency_orders/phe_2020_emergency_order_05/phe_2020_emergency_order_05.

³ The term “confined or enclosed space” is undefined in Emergency Order #8.

⁴ Emergency Order #12 may be viewed in its entirety at:

https://docs.legis.wisconsin.gov/code/register/2020/771B/register/emergency_orders/phe_2020_emergency_order_12/phe_2020_emergency_order_12.

the service is in a room or confined space⁵, Emergency Order #12 limits the number of gathered individuals to fewer than 10 people at a time.

DISCUSSION

Under both Emergency Orders #8 and #12, it is permissible for a religious service to be held outside, including a drive-up service, as long as there is compliance with certain restrictions specified in the orders. Under Emergency Order #8, if a religious service is not in a single confined or enclosed space, whether inside or outside, it does not meet the definition of a mass gathering and is not prohibited under Emergency Order #8. If, however, the religious service is outdoors, in a confined or enclosed space, and brings together an aggregate of 10 or more people in that single room or confined or enclosed space, then pursuant to Emergency Order #8, the service may only permit a maximum of nine people in the single room or confined or enclosed space if the religious service does both of the following: (1) preserves social distancing of at least six feet between people and avoiding all direct physical contact; and (2) follows all other public health recommendations issued by DHS and the CDC.

Under Emergency Order #12, religious services are expressly encouraged to continue while the order is in effect. Regardless of where the service is held, all of the individuals in attendance at the service must adhere to the following social distancing requirements as much as possible: (1) maintaining social distancing of six feet between people, except that this does not apply to family members living in a single living unit or household members; (2) washing hands with soap and water for at least 20 seconds as frequently as possible or using hand sanitizer; (3) covering coughs or sneezes (into the sleeve or elbow, not hands); (4) regularly cleaning high-touch surfaces; (5) not shaking hands; and (6) following all other public health recommendations issued by DHS and the CDC. If the religious service is held in an unconfined outdoor space, there is no limit to the number of individuals that may attend at any one time. Family members living in a single living unit and household members can attend the service without having to maintain the six feet social distancing requirement. However, if the religious service is held in a confined outdoor space, then under Emergency Order #12, the number of individuals that may be in the confined outdoor space at any one time is limited to nine or fewer people.

As of the date of the memorandum, it appears that Emergency Order #12 has temporarily superseded Emergency Order #8. Thus, any religious service held between the dates of this memorandum until 8:00 a.m. on April 24, 2020, must adhere to the requirements set forth in Emergency Order #12. Any religious service held on or after 8:00 a.m. on April 24, 2020, must adhere to the requirements set forth in Emergency Order #, until it terminates on May 11, 2020, or is extended by an act of the Legislature, or is superseded by another emergency order.

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

MS:ksm

⁵ The term "confined space" are not defined in Emergency Order #12.