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# 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  
Emergency Order #28

DATE: May 6, 2020

This memorandum, prepared at your request, responds to your question of whether it is permissible under Emergency Order #28, the revised “Safer at Home” order, for a religious service, including a drive-up religious service, to be held outside. Emergency Order #28<sup>1</sup> was ordered by the Department of Health Services (DHS) Secretary-Designee Andrea Palm on April 16, 2020, and went into effect immediately at 8:00 a.m., on Friday, April 24, 2020, when the first “Safer at Home” order, Emergency Order #12,<sup>2</sup> expired. Emergency Order #28 is currently in effect until 8:00 a.m. May 26, 2020, or until it is superseded or struck down.<sup>3</sup>

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 #28), will depend upon how a court will apply past preemption cases to any preemption challenge to a local order.

## EMERGENCY ORDER #28

Emergency Order #28 was issued by DHS Secretary-Designee Palm in response to the spread of the COVID-19 disease. The order curtails, and in some cases prohibits, activities that are otherwise permissible. The order is enforced at the discretion of any local law enforcement official, including county sheriffs, and any violation or obstruction of the order is punishable by up to 30 days imprisonment, a fine of up to \$250, or both. As it relates to your specific inquiry, the order provides

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<sup>1</sup> Emergency Order #28 may be viewed in its entirety at:

[https://docs.legis.wisconsin.gov/code/register/2020/772A3/register/emergency\\_orders/phe\\_2020\\_emergency\\_order\\_28](https://docs.legis.wisconsin.gov/code/register/2020/772A3/register/emergency_orders/phe_2020_emergency_order_28).

<sup>2</sup> Emergency Order #12 may be view 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](https://docs.legis.wisconsin.gov/code/register/2020/771B/register/emergency_orders/phe_2020_emergency_order_12/phe_2020_emergency_order_12).

<sup>3</sup> As of the date of this memorandum, there are two pending Wisconsin Supreme Court cases that may impact whether Emergency Order #28 remains in effect. These two cases are *Wisconsin Legislature v. Palm*, No. 2020AP765-OA, and *Fabick v. Palm*, No. 2020AP828-OA.

that all nonessential businesses and operations, except essential businesses and operations, must cease activities within Wisconsin until 8:00 a.m. on Tuesday, May 26, 2020.

Under Emergency Order #28, 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, entities groups, and gatherings, and weddings and funerals are specifically included in the “definition of essential businesses and operations.”

Related to religious services, Emergency Order #28 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 and 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 Center for Disease Control (CDC).<sup>4</sup> In addition, if the service is in a room or confined space,<sup>5</sup> Emergency Order #28 limits the number of gathered individuals to fewer than 10 people at a time.

## DISCUSSION

Under Emergency Order #28, 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. The order expressly encourages religious services 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 six social distancing requirements listed above as much as possible. 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 #28, the number of individuals that may be in the confined outdoor space at any one time is limited to nine or fewer people.

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

MS:ksm

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<sup>4</sup> According to Emergency Order #28, DHS guidelines are located at: <https://www.dhs.wisconsin.gov/covid-19/index.htm>.

<sup>5</sup> The term “confined space” is not defined in Emergency Order #28.