



WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

Executive Orders

Executive orders are directives issued by the Governor. Typically they have the force and effect of law until repealed or superseded by a subsequent executive order or legislation. The Governor's authority to issue executive orders derives from statutes and the Wisconsin Constitution. Several Wisconsin statutes specifically authorize executive orders regarding given subject matters. For example, 2011 Wisconsin Act 21 authorizes the Governor to issue executive orders to prescribe guidelines to ensure that administrative rules are promulgated in compliance with statute.

In addition, it is widely recognized that the Governor has an implied authority to issue executive orders based on powers conferred under the Wisconsin Constitution. The extent of the Governor's implied constitutional authority to issue executive orders has not been fully tested by Wisconsin courts, and may, in some cases, be limited under the Separation of Powers doctrine.

USE OF EXECUTIVE ORDERS IN WISCONSIN

Wisconsin Governors have issued executive orders since the mid-Nineteenth Century to address a wide range of issues.¹ Common actions taken by executive order include directing flags to be flown at half staff; creating a task force, council, committee, or commission; calling a special election to fill a legislative or judicial vacancy; calling a special legislative session; calling the Wisconsin National Guard to service; designating a structure or area as a historical landmark; and declaring a state of emergency. Most of these common types of executive orders govern areas over which the Governor has sole responsibility under an express or implied legal authority or by historical practice.

Less commonly, Wisconsin Governors have issued executive orders taking actions that could arguably, have been taken by the Legislature. For example, Governor Knowles established a uniform system of administrative districts by executive order. Governor Lucey issued executive orders requiring access to buildings by people with disabilities and creating an

¹ For a subject index of executive orders issued by Wisconsin Governors since 1965, see Legislative Reference Bureau, *Subject Index to Executive Orders*, at <http://legis.wisconsin.gov/lrb/pubs/special/SubjIndexExec.pdf>.

affirmative action program. Governor Dreyfus issued an executive order establishing a nursing home ombudsman program. Governor Thompson issued an executive order transferring responsibilities for the Higher Educational Aids Board and the Educational Approval Board programs to the Department of Administration (DOA).

STATUTORY AUTHORITY TO ISSUE EXECUTIVE ORDERS

Several statutes grant the Governor the express authority to issue executive orders. For example, the Governor is statutorily authorized to issue an order calling for a special election; creating a nonstatutory committee; declaring a state of emergency or certifying a state “energy emergency”; assigning specified responsibilities to the Technical College System Board; or approving academic standards. [ss. 8.50 (1) (a), 14.019, 14.23, 38.40 (1), 115.001 (3) and 323.10, Stats.] In some cases, the authority to issue an executive order may also be implied from a statute.

CONSTITUTIONAL AUTHORITY TO ISSUE EXECUTIVE ORDERS

The Wisconsin Constitution does not expressly address the power of the Governor to issue executive orders. Rather, the Governor’s constitutional authority to issue executive orders is implied from the powers conferred upon the Governor by the Constitution.

Specifically, the Wisconsin Constitution provides that “the executive power shall be vested in” the Governor. [Wis. Const. art. V, s. 1.] It also provides that the Governor shall be commander in chief of the military and naval forces of the state; has the power to convene the Legislature on extraordinary occasions; shall transact all necessary business with the officers of the government, civil and military; shall expedite all such measures as may be resolved upon by the Legislature; and shall take care that the laws be faithfully executed. [Wis. Const. art. V, s. 4.]

Executive orders representing the exercise of the Governor’s “executive power” may address general management needs of state government, including for example, issues such as the state personnel system, general employee performance, and the kinds of supervisory problems a manager in any business might encounter in trying to improve employee productivity.

Executive orders resting on the Governor’s duty to “take care that the laws be faithfully executed” generally have involved the Governor taking initiative to direct administrative agencies’ attention to new developments in the law² and practical methods by which general statutory directives can be implemented.

² See, e.g., Executive Order No. 9 (1976). (Governor Lucey interpreted “laws” broadly in this order which established state government’s first affirmative action program in the absence of state legislation on the subject. The “laws” referred to in the order included federal statutes, presidential orders, court decisions, and federal agency rulings.)

POTENTIAL LIMITATIONS ON THE GOVERNOR'S AUTHORITY

The Wisconsin Supreme Court has not directly examined the limits on the Governor's authority to issue executive orders pursuant to the Wisconsin Constitution.³ Although the Governor is clearly authorized to issue executive orders on a broad range of topics, questions may arise with regard to executive orders that exceed the Governor's authority or that take actions that could be characterized as legislative in nature.

The Separation of Powers doctrine would likely govern such questions. Under the Wisconsin Constitution, "the legislative powers shall be vested in a senate and assembly"⁴; "the executive power shall be vested in a governor"⁵; and the judicial "power of the state shall be vested in a unified court system."⁶

Generally, one branch of government is not permitted to intrude on the exclusive domain of another. Some executive orders based upon the Governor's constitutional powers may fall within the domain of the Governor's exclusive authority. For example, under the Wisconsin Constitution, the role of Commander in Chief belongs exclusively to the Governor; thus, the Governor may exercise exclusively executive power when issuing an order affecting the Wisconsin National Guard.

However, the Wisconsin Supreme Court has acknowledged that "governmental functions and powers are too complex and interrelated to be neatly compartmentalized."⁷ Thus, the different branches may have overlapping constitutional authority over many areas of government. For example, the executive and legislative branches arguably have overlapping authority over many aspects of state agencies' work. In such instances, the courts "analyze separation of powers claims not under formulaic rules but under general principles that recognize both the independence and interdependence of the three branches of government."⁸ Under the prevailing test, no one branch may "unduly burden" or "substantially interfere with" the powers of another branch.⁹

Under that framework, when reviewing an executive order that arguably includes an element of legislation, a court may ask whether the executive order substantially interferes with the

³ In addition to any potential limits on the Governor's authority to issue executive orders, executive orders, like statutes, may be challenged in court as violating the Wisconsin Constitution, and may be struck down if they are found to be unconstitutional.

⁴ Wis. Const. art. IV, s. 1.

⁵ Wis. Const. art. V, s.1.

⁶ Wis. Const. art. VII, s. 2.

⁷ *Panzer v. Doyle*, 2004 WI 52, P49 (Wis. 2004).

⁸ *Id.*

⁹ *Flynn v. Department of Admin.*, 216 Wis. 2d 521, 546 (Wis. 1998).

Legislature's ability to enact legislation. Presumably, the answer will typically be no, provided that the Legislature may act to reverse or modify a directive issued in an executive order.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Anna Henning, Staff Attorney, and Dan Schmidt, Senior Analyst, on May 31, 2011.

WISCONSIN LEGISLATIVE COUNCIL

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536

Telephone: (608) 266-1304 • Fax: (608) 266-3830

Email: leg.council@legis.state.wi.us

<http://www.legis.state.wi.us/lc>