



# Extension and Expiration of the Public Health Emergency and the “Safer at Home” Orders Related to COVID-19

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Wisconsin statutes provide broad statutory authority to the Governor and the Department of Health Services (DHS) during a public health emergency and when a communicable disease is present in the state.<sup>1</sup> Both Governor Tony Evers and DHS Secretary-designee Andrea Palm have issued various executive and emergency orders related to COVID-19 pursuant to this authority.<sup>2</sup>

This Issue Brief discusses the statutory authority cited by the Governor and DHS for [Executive Order #72](#), [Emergency Order #12](#), and [Emergency Order #28](#). It also discusses how these statutes provide for extension and expiration of those orders, including whether the statutes include an explicit role for the Legislature as it relates to extending or revoking an order.

## AUTHORITY TO ISSUE EXECUTIVE ORDER #72

If the Governor determines that a public health emergency exists, he or she may issue an executive order declaring a state of emergency related to public health for the State of Wisconsin or any portion of the state and may designate DHS as the lead state agency to respond to that emergency. [[s. 323.10, Stats.](#)] Under current law, a state of emergency declared by the Governor may not exceed 60 days, except that it may be extended by joint resolution of the Legislature. Such an executive order may also be revoked at any time by the Governor by executive order or by the Legislature by joint resolution.

On March 12, 2020, Governor Evers issued Executive Order #72 in response to the COVID-19 coronavirus pandemic,<sup>3</sup> declaring a state of emergency relating to public health pursuant to his authority under s. 323.10, Stats.<sup>4</sup> Executive Order #72 did not designate an expiration date within the order. Therefore, the public health emergency declared by the Governor under Executive Order #72 will automatically expire on May 11, 2020 (60 days after it was declared) unless it is revoked earlier by the Governor or the Legislature.

Additionally, if Executive Order #72 expires or is revoked by either the Governor or the Legislature, any emergency order issued pursuant to gubernatorial authority that is valid only during a state of emergency would likewise expire.<sup>5</sup>

## AUTHORITY TO ISSUE EMERGENCY ORDERS #12 AND #28, “SAFER AT HOME”

In addition to acting as the lead agency during a public health emergency, DHS also has broad statutory authority, whether or not a state of emergency is declared, to control communicable diseases in Wisconsin pursuant to [s. 252.02, Stats.](#) Among its specific powers under s. 252.02, Stats., DHS may do all of the following:

- Close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics. [[s. 252.02 \(3\), Stats.](#)]
- Authorize and implement all emergency measures necessary to control communicable disease. [[s. 252.02 \(6\), Stats.](#)]
- Issue orders for guarding against the introduction of any communicable disease into the state, for the control and suppression of communicable diseases, for the quarantine and disinfection of persons,

localities, and things infected or suspected of being infected by a communicable disease and for the sanitary care of jails, state prisons, mental health institutions, schools, and public buildings and connected premises. [[s. 252.02 \(4\), Stats.](#)]

Section 252.02, Stats., does not explicitly limit the amount of time an order or measure may be in effect or otherwise provide the Legislature with ongoing oversight authority over actions taken by DHS pursuant to this statutory authority.<sup>6</sup> However, the Legislature may enact legislation in order to limit DHS' power under this statute or may otherwise assert its authority to supervise the administration of an order issued pursuant to this statute.

Emergency Order #12, also known as the “Safer at Home” order, was issued by Secretary-designee Palm on March 24, 2020. Emergency Order #12 was issued pursuant to s. 252.02 (3) and (6), Stats.<sup>7</sup> The order curtails, and in some cases prohibits, activities that would otherwise be permissible. For example, with certain exceptions, Emergency Order #12 requires individuals to stay at home and nonessential businesses to cease operations. The order specifies that it expires at 8:00 a.m. on April 24<sup>th</sup>, 2020.

Emergency Order #28, issued by Secretary-designee Palm on April 16, 2020 becomes effective at the expiration of Emergency Order #12 and extends many of the provisions within Emergency Order #12 until 8:00 a.m. on May 26, 2020. Emergency Order #28 was issued pursuant to s. 252.02 (3), (4), and (6), Stats.

It should also be noted that, if Emergency Order #12 is rescinded before it expires, or if Emergency Order #28 is rescinded or allowed to expire without further extension, it appears that certain emergency orders that are currently superseded by Emergency Order #12, may go into effect. For example, Emergency Order #8, relating to a prohibition on mass gatherings, which is currently superseded by Emergency Order #12 (and Emergency Order #28 when that goes into effect) explicitly specifies that it remains in effect for the duration of the public health emergency declared in Executive Order #72 or until superseded by another order. Therefore, if the public health emergency is still in effect at the time Emergency Orders #12 or #28 expire, Emergency Order #8 would likewise be in effect.<sup>8</sup>

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<sup>1</sup> For more information regarding state and local officials' authority in a public health emergency, see Legislative Council Information Memorandum IM-2020-01, *Authority of Public Health Officials During a Public Health Emergency*, available at <http://lc.legis.wisconsin.gov/>.

<sup>2</sup> A copy of each executive and emergency order may be located in the [Administrative Register](#) published for the week in which the order was issued or at <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx>.

<sup>3</sup> For more information regarding the provisions of Executive Order #72 and the legal authority used to issue various emergency orders not discussed in this Issue Brief, see Legislative Council Issue Brief, *Executive Order #72 and the Public Health Emergency Related to COVID-19*, available at <http://lc.legis.wisconsin.gov/>.

<sup>4</sup> Note that, though Executive Order #72 cites a number of statutes as the authority for various actions outlined within the order, including ss. [100.305](#), [321.39](#), [323.12](#), and [323.13](#), Stats., the statutory authority relied upon by the Governor to issue the order itself is s. 323.10, Stats.

<sup>5</sup> In taking certain actions, the Governor has cited legal authority that only applies during a state of emergency. For example, the Governor's actions in certain emergency orders that suspend administrative rules is contingent on his authority to suspend administrative rules during a state of emergency. [See [s. 323.12 \(4\)\(d\), Stats.](#)]

<sup>6</sup> There are no published court cases that examine any possible limits on DHS' authority to act under s. 252.02, Stats. Additionally, given the unprecedented breadth and scope of both Emergency Order #12 and the current public health emergency, it is difficult to predict how a court would decide a legal challenge to an emergency order issued pursuant to this statutory authority. For more information regarding potential legal challenges to Emergency Order #12 and #28, see Legislative Council Information Memorandum IM-2020-02, *Constitutional Considerations Relating to Emergency Order #12, “Safer at Home,”* available at <http://lc.legis.wisconsin.gov/>.

<sup>7</sup> In Emergency Order #12, Secretary-designee Palm also cites “all powers vested in me through Executive Order #72, and at the direction of Governor Tony Evers,” but does not specify whether any of the actions outlined within the order were made only pursuant to that authority. Emergency Order #28 does not reference Executive Order #72 or indicate the order came at the direction of the Governor.

<sup>8</sup> For more information regarding the interplay between Emergency Order #12 and Emergency Order #8, see Legislative Council Memorandum from Senior Staff Attorney Melissa Schmidt to Senator David Craig, *Religious Services Conducted Outside During the Mass Gathering Ban and the Safer at Home Order*, made public by Senator Craig on April 9, 2020, available at [http://www.thewheelerreport.com/wheeler\\_docs/files/040920craiglcmemo\\_02.pdf](http://www.thewheelerreport.com/wheeler_docs/files/040920craiglcmemo_02.pdf) (note that certain highlighted portions of the memorandum were made by its recipient).