



Wisconsin Legislature v. Palm

Prepared by: Anna Henning, Senior Staff Attorney, and Scott Grosz, Principal Attorney

In *Wisconsin Legislature v. Palm*, 2020 WI 42, the Wisconsin Supreme Court [invalidated](#) Emergency Order #28 (“EMO #28”), the “safer at home” order issued by Department of Health Services (DHS) Secretary-Designee Palm on April 16, 2020, effective immediately, except with respect to school closures. This issue brief provides relevant background information and summarizes the Court’s decision.

THE “SAFER AT HOME” ORDER

The Evers Administration has taken [numerous actions](#) in response to the COVID-19 outbreak. Most relevant to the court decision, DHS issued [EMO #28](#), which replaced a [previous “safer at home” order](#) and expires at 8:00 a.m. on May 26, 2020. As partially revised by additional DHS orders,¹ and with numerous exceptions, EMO #28 generally requires all individuals within the State of Wisconsin to stay at home or at their place of residence and directs all “non-essential” nonprofit and for-profit businesses to cease operations at facilities located in Wisconsin.

DHS relied on [s. 252.02 \(3\), \(4\), and \(6\), Stats.](#), to issue EMO #28. Together with [other statutory authority](#) relating to the control of communicable diseases, those provisions authorize DHS to: close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics; promulgate rules and issue orders for guarding against the introduction of any communicable disease into the state and for the control and suppression of communicable diseases; and authorize and implement all emergency measures necessary to control communicable diseases. Both [the statutes](#) and the order specify criminal penalties for violating the order.

RULEMAKING PROCEDURES

State agencies promulgate administrative rules pursuant to rulemaking authority conferred by the Legislature, subject to [legislative oversight and promulgation procedures](#) under [ch. 227, Stats.](#) For purposes of [ch. 227, Stats.](#), “rule” is [defined](#), in pertinent part, to include a “general order of general application that has the force of law.”

The process to promulgate a permanent rule provides opportunities for public participation and legislative and gubernatorial review at multiple stages, resulting in timelines that often stretch beyond a year from publication of a “scope statement” until a rule takes effect. However, an agency may adopt a temporary “emergency rule,” if the agency determines that the preservation of public peace, health, safety, or welfare necessitates doing so. The [emergency rulemaking process](#) is set forth in [s. 227.24, Stats.](#) When a new scope statement is required, the emergency rulemaking process takes a minimum of approximately two weeks from submission of the scope statement until an emergency rule takes effect.

PETITION FOR ORIGINAL ACTION AND PARTIES’ ARGUMENTS

On April 21, 2020, the Legislature filed an emergency petition requesting that the Wisconsin Supreme Court exercise its original jurisdiction² to consider questions relating to DHS’s authority to issue EMO #28. On May 1, 2020, the Wisconsin Supreme Court granted the Legislature’s emergency petition for original action to consider the following two questions:

- Whether DHS violated [s. 227.24, Stats.](#), governing emergency rules, by issuing EMO #28 without complying with [s. 227.24’s](#) procedures.

- Even if DHS did not violate s. 227.24, Stats., whether EMO #28 exceeds the department’s authority by closing all “nonessential” businesses, ordering all Wisconsin persons to stay at home, and forbidding all “nonessential” travel.

The Court held oral arguments in the case on May 5, 2020. In its [briefs](#) and oral argument, the Legislature argued, in part, that orders issued under s. 252.02, Stats., fall within the definition of a “rule” for purposes of ch. 227, Stats., and are therefore subject to rulemaking procedures and legislative oversight under that chapter. Because DHS did not promulgate EMO #28 as a rule, the Legislature requested the Court to enjoin (stop enforcement of) the order, but with a short delay to allow DHS to pursue emergency rulemaking. The Legislature conceded that it likely lacks the legal standing to challenge the order on some [constitutional grounds](#).

In its [response](#) and oral argument, DHS argued, in part, that EMO #28 is authorized by the broad grant of authority under s. 252.02 (3), (4), and (6), Stats., to control communicable diseases. DHS also argued that a time-limited emergency order is not a “general order of general application” for purposes of the ch. 227 definition of “rule,” because it is limited by both time and context – i.e., it is limited to responses necessary to control communicable disease, and because interpreting the order to be a “rule” would render references to “orders” in ch. 252, Stats., superfluous.

WISCONSIN SUPREME COURT DECISION

The Wisconsin Supreme Court released its decision in *Palm* on May 13, 2020. The decision invalidates EMO #28 effective immediately, except with respect to the provision of the order that closes schools.

In a majority opinion by Chief Justice Roggensack, joined by Justices Ziegler, Grassl Bradley, and Kelly, the Court held that EMO #28 is a “rule” for purposes of ch. 227, Stats., and thus is invalid because it was not promulgated under the rulemaking procedures under that chapter.³ Noting that EMO #28 applies to “all persons in Wisconsin,” the Court concluded that the order is a “general order of general application” for purposes of the ch. 227 definition of “rule,” and is not one of the types of agency actions specifically exempted from that definition. The court also emphasized that subjecting DHS’s statutory authority to legislative oversight and rulemaking procedures avoids “serious constitutional questions” that might otherwise arise, in part because the order imposes criminal penalties.

In addition, stating that the Court “cannot expansively read statutes with imprecise terminology that purport to delegate lawmaking authority to an administrative agency,” the Court emphasized the breadth of EMO #28’s prohibitions to hold that the order exceeds DHS’s statutory authority. In doing so, the Court relied in part on a [provision](#) enacted in the 2011 Legislative Session, which prohibits agencies from implementing or enforcing standards that are not explicitly required or permitted by statute or rule.

Three concurring opinions and three dissenting opinions were also filed. In separate concurring opinions, Chief Justice Roggensack stated that she would stay (delay) the opinion’s effect until May 20, 2020; Justice Grassl Bradley raised concerns relating to abuse of power, separation of powers, and individual liberty; and Justice Kelly emphasized considerations under the [separation of powers and nondelegation doctrines](#).

Dissenting opinions by Justice Hagedorn and Justice Dallet disagree with the majority on the questions of statutory interpretation. In her dissenting opinion, Justice Dallet concluded that DHS has the authority to issue general orders not subject to ch. 227, Stats., while Justice Hagedorn concluded that ch. 227, Stats., does not apply because DHS orders lack prospective application after the COVID-19 outbreak and, thus, are not of general application. Justice Walsh Bradley also filed a dissenting opinion to note that the chief justice’s concurring opinion may create confusion regarding the effective date of the decision and to express concerns about the public health risks of an immediately effective decision.

¹ See, for example, [EMO #34](#) and [EMO #36](#), which “turn the dial” by providing certain additional exceptions to the general requirements under EMO #28.

² Four or more members of the Wisconsin Supreme Court may vote to take jurisdiction of a case as an “original action,” without waiting for lower court decisions, in cases where the facts are uncontested. [Wis. Const. art. VII, s. 3 (2); [s. 809.70, Stats.](#); [Sup. Ct. Internal Operation Procedures, s. III\(B\) \(3\).](#)]

³ The majority did not address whether a similar analysis would apply to actions taken by the Governor under ch. 323, Stats.