



MEMORANDUM

TO: Speaker Robin Vos
FROM: Tamara Dodge, senior coordinating attorney
DATE: October 7, 2020
SUBJECT: Analysis of Emergency Order #3 and *Wisconsin Legislature v. Palm*

You have asked me to analyze whether, considering the Wisconsin Supreme Court’s opinion in *Wisconsin Legislature v. Palm*¹, Emergency Order #3 issued on October 6, 2020, should be promulgated by the Department of Health Services as a rule.

On October 6, 2020, Secretary-designee Palm of the Department of Health Services issued Emergency Order #3 citing as authority Wis. Stat. § 252.02 (3) among other general constitutional duties. Emergency Order #3 defines public gatherings and then limits public gatherings to 25 percent of the established capacity of the room or building or, if no capacity has been determined, 10 persons. Emergency Order #3 specifies those settings that are exempt from the order’s limitation on public gatherings but otherwise applies to public gatherings “planned or spontaneous” statewide.² Emergency Order #3 goes into effect on October 8 and expires on November 6, 2020.

Brief answer

A court following the reasoning of *Wisconsin Legislature v. Palm* would likely require Emergency Order #3, which limits public gatherings, to be promulgated as a rule.

Analysis

Wis. Stat. § 252.02 provides DHS statutory authority to control communicable disease and explicitly allows DHS to “close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.”³ Citing authority under Wis. Stat. § 252.02, Secretary-designee Palm of DHS issued Emergency Order #28, the “Safer at Home” order on April 16, 2020. In *Wisconsin Legislature v. Palm*, a case challenging the order, the Wisconsin

¹ *Wisconsin Legislature v. Palm*, [2020 WI 42](#).

² [Emergency Order #3](#), limiting public gatherings, issued October 6, 2020, by Secretary-designee Palm, Department of Health Services.

³ Wis. Stat. § [252.02 \(3\)](#).

Supreme Court ruled Emergency Order #28 unenforceable.⁴ The court’s reasons for this ruling are 1) that Emergency Order #28 was an order of general application that meets the definition of a rule requiring rulemaking procedures and 2) the order “confining all people to their homes, forbidding travel and closing businesses exceeded the statutory authority of Wis. Stat. § 252.02” upon which DHS relied to make the order.⁵ Relevant to this memorandum is whether or not Emergency Order #3 also is an order of general application that requires rulemaking procedures.⁶

The Wisconsin Supreme Court addressed the rulemaking procedure question first by examining the statutory definition of a rule.⁷ A rule exists and rulemaking is required when an order is a general order of general application that has the effect of law.⁸ For its determination of what constitutes a “general order of general application” the court relied on its own precedent, including the case *Citizens for Sensible Zoning, Inc. v DNR*.⁹ The primary focus for the court in deciding whether the action is one of “general application” is the persons affected by the action.¹⁰ The court considers an order to be of general application when it applies to a class of persons that is “described in general terms and new members can be added to the class.”¹¹

Emergency Order #3 applies to an “indoor event, convening, or collection of individuals, whether planned or spontaneous” that is considered open to the public under the definitions in the order. This order applies throughout the state and may apply to any individual who is indoors in a collection of individuals who are not part of the same household. Individuals who are not present in the state at the time the order goes into effect become subject to the order when entering the state to convene with other individuals in a circumstance described in the order. While some gatherings of individuals are not considered to be limited by Emergency Order #3, those same gatherings may become noncompliant with the order with the arrival of uninvited guests or unauthorized personnel. A private residence that typically is not considered open to the public may become subject to the public gathering restriction by opening the doors and not preventing persons from entering. During the time the order applies new businesses, such as restaurants, taverns, retail stores, or music venues, may open for business, thus becoming subject to the order. Using these examples in which an ever shifting set of individuals and businesses must beware of running afoul of the order, a court is likely to find that the class is generally described and new members can be added to the class of those subject to the order, thus meeting

⁴ Wisconsin Legislature v. Palm, [2020 WI 42](#), ¶ 58.

⁵ *Id.*, ¶¶ 58-59.

⁶ This memorandum does not analyze whether any portion of Emergency Order #3 exceeds the statutory authority given DHS under Wis. Stat. § 252.02 (3).

⁷ Wisconsin Legislature v. Palm, [2020 WI 42](#), ¶ 15-16. Wis. Stat. § 227.01 (13) defines “rule” to mean the following: a regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.

⁸ Wisconsin Legislature v. Palm, [2020 WI 42](#), ¶ 22.

⁹ *Citizens for Sensible Zoning, Inc. v DNR*, [90 Wis. 2d 804](#) (1979).

¹⁰ Wisconsin Legislature v. Palm, [2020 WI 42](#), ¶ 23.

¹¹ *Id.*, ¶ 21.

the court's criteria for an order of general application. Therefore, to comply with *Wisconsin Legislature v. Palm* such an order would need to be promulgated as a rule.

To be clear, there are distinctions between this Emergency Order #3 and the Emergency Order #28 ruled unenforceable in *Wisconsin Legislature v. Palm*. Emergency Order #3 takes the single action of forbidding public gatherings, which is an action explicitly listed in Wis. Stat. § 252.02 (3). Emergency Order #28 was much broader in the types of conduct restricted and made orders that are not explicitly authorized by statute. Emergency Order #3 also limits the time the order applies to approximately one month. The Wisconsin Supreme Court did not provide clear guidance for determining when orders are sufficiently narrow in scope to avoid needing to comply with *Wisconsin Legislature v. Palm*'s reasoning requiring rulemaking procedures. It is possible to envision an order forbidding public gatherings that is very narrow in scope geographically or in other ways that would not qualify as an order of general application and that could be upheld as enforceable without rulemaking. It is likely that Emergency Order #3, being of statewide application to individuals convening or collecting indoors, is not so limited that a court would readily distinguish it from *Wisconsin Legislature v. Palm* and decline to follow its reasoning.

Conclusion

Following *Wisconsin Legislature v. Palm*, the applicable test is whether Emergency Order #3 is an order of general application based on the class of persons to which the order applies. A court applying this test would likely determine that Emergency Order #3 is an order of general application and that, therefore, DHS is required to follow rulemaking procedures to make such an order.

I hope you have found this memorandum helpful. Please let me know if the LRB can provide any additional assistance.