

CONFIDENTIAL LEGAL MEMORDANDUM

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Wisconsin Counties Association

FROM: Andrew T. Phillips and Bennett J. Conard
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RE: 2021 Senate Joint Resolution 3

DATE: January 28, 2020

BACKGROUND

On January 19, 2021, Governor Evers issued Emergency Order #104 (“EO #104”) declaring a public health emergency due to the ongoing COVID-19 pandemic. EO #104 is the latest in a series of Executive Orders dating back to July 30, 2020 that were primarily intended to impose a face covering mandate throughout the state. Each Executive Order is only effective for sixty (60) days unless extended by joint resolution of the Legislature. The Governor has issued a new Executive Order roughly every sixty (60) days to declare a “new” public health emergency because the Legislature has not elected to extend the emergency period declared under any of the Executive Orders.

In response to EO #104, Senate Joint Resolution 3 (the “Resolution”) was introduced in the Wisconsin State Senate. The Resolution relates to terminating the COVID-19 public health emergency, including all emergency orders and actions taken pursuant to declaration of the public health emergency.¹ The Wisconsin State Senate adopted the Resolution on January 26, 2021, and the Assembly has received the Resolution, but postponed official action for the time being.²

¹ See Wis. Stat. § 323.10 (providing that an executive order declaring a state of emergency (including public health emergencies) may be revoked by the Legislature through the adoption of a joint resolution).

² The Resolution also provides that the Governor did not have authority to issue EO #104, and therefore, that EO #104 was legally void from its date of issuance. However, this analysis is outside the scope of this memorandum. Instead, this memorandum will simply refer to EO #104 as being terminated upon adoption of the Resolution by both chambers of the Wisconsin Legislature and will not address whether EO #104 was ever legally effective.

Given these events, the Association has requested an analysis of what emergency orders, emergency authority, and emergency rules would be effected if the Resolution is adopted and EO #104 is terminated. Our analysis follows.

ANALYSIS

If the Assembly joins the Senate in passing the Resolution, EO #104 will be terminated and ineffective. Three categories of emergency authority are at issue, including (1) emergency orders issued under the authority of EO #104; (2) statutory exemptions or authority resulting from a declared state of emergency; and (3) emergency rules enacted under the authority of Wis. Stat. § 227.24.

1. Emergency Orders

The termination of EO #104 means that any subsequent emergency orders stemming from EO #104 would also be terminated. At this time, the only emergency order issued under the authority of EO #104 is Emergency Order #1 dated January 19, 2021 (relating to face covering requirements). Therefore, the statewide face covering requirements would no longer be in effect.³

2. Statutory Exemptions and Authority During a Declared State of Emergency

Likewise, any statutory or administrative code exemptions or authority that is triggered during a declared state of emergency would also terminate. The number of effected statutory provisions is too voluminous to reproduce an exhaustive list here. However, the following are examples of affected chapters and/or sections of interest to counties:

1. Wis. Stat. § 257.03 (volunteer practitioner (*e.g.*, first responders, health care workers, lab technicians, etc.) indemnification).
2. Wis. Stat. chs. 250 and 252 (DHS authority as “public health authority”).
3. Wis. Stat. § 895.51(2m) (relating to immunity from civil liability for persons (*e.g.*, manufacturers, distributors, or sellers) who donate qualified emergency household products in response to the declared state of emergency).
4. Wis. Stat. § 321.39 (calling members of the national guard to active duty).
5. Wis. Stat. § 66.0602(3)(e)(8) (permitting political subdivisions to exceed their levy limit to pay unreimbursed expenses related to the declared emergency).

Again, the emergency authority granted under these chapters and/or sections cannot be utilized if there is not a declared state of emergency in effect pursuant to Wis. Stat. § 323.10.

³ The Resolution has no effect on any local face covering requirements or other public health requirements that may be in place under local health officer or other local governmental authority. The validity of any public health measures implemented by local health officers or other local governmental officials are outside the scope of this memorandum.

3. Emergency Rules under Wis. Stat. § 227.24

In contrast to the exemptions triggered by a declared state of emergency by the Governor, emergency rules enacted pursuant to Wis. Stat. § 227.24, even if implemented in response to the COVID-19 pandemic, are unaffected by the expiration of EO #104. State agency authority to enact emergency rules is not contingent upon a declared state of emergency under Wis. Stat. § 323.10. Rather, the authority to implement emergency rules is provided to agencies directly under Wis. Stat. 227.24. Importantly, an agency is permitted to “promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements under [chapter 227] if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.” (emphasis added). An agency need only make such a determination (based on existing conditions) and satisfy the required emergency rule making process.

While the emergency rule making process is highly expedited compared to the standard administrative rule making process, the agency must still follow a number of steps, including the following key provisions:

1. Prepare a statement of scope (the statement of scope must be approved by the Department of Administration, the Governor, and the individual or body with policy-making powers over the subject matter of the proposed emergency rule), send the statement of scope to the Legislative Reference Bureau, and hold a preliminary public hearing and comment period.
2. Submit the proposed emergency rule in final draft form to the Governor for approval. The Governor, in his or her discretion, may approve or reject the proposed emergency rule. If the Governor approves a proposed emergency rule, the Governor shall provide the agency with a written notice of that approval. An emergency rule may not be published until the Governor approves the emergency rule in writing.

If an agency receives the Governor’s approval of the emergency rule, the agency may publish the rule and the rule then becomes effective.⁴

Importantly, an emergency rule only remains in effect for 150 days unless extended by the Legislature’s joint committee for review of administrative rules (“JCRAR”) for additional periods of up to sixty (60) days (subject to a maximum total extension of up to 120 days). Further, the effectiveness of an emergency rule may not be extended beyond the initial effective period (including permitted extensions, if any) by simply refile it as a new emergency rule. 62 Atty Gen. 305. This could cause issues in the future for emergency rules that have exhausted the 150 day effective period (and the total 120 days of extensions permitted by JCRAR, if granted) if permanent rulemaking procedures have not been taken and/or new legislation addressing the effects of the pandemic is not passed.

⁴ However, JCRAR may suspend rules or portions of rules. Wis. Stat. § 227.26(2)(d).

Given the limited period of effectiveness of emergency rules and the large number of emergency rules enacted since the start of the pandemic, we created the chart below showing the emergency rules enacted in response to the pandemic that are currently in effect:

Emergency Rule	Effective Date	Expiration Date	Comment
EmR2006 Related to: Work search actions, availability for work, and work available for people filing claims with the unemployment insurance program during the COVID-19 pandemic	May 9, 2020	February 2, 2021	Extended past original 150 day effective period by JCRAR.
EmR2009 ⁵ Related to: DCF rule suspensions and modifications related to COVID-19	May 19, 2020	February 11, 2021	Extended past original 150 day effective period by JCRAR.
EmR2011 Relating to: Waiving interest in limited circumstances for employers subject to reimbursement financing when reimbursements are delinquent due to COVID-19	June 5, 2020	March 1, 2021	Extended past original 150 day effective period by JCRAR.
EmR2014 Related to: COVID-19 protections for migrant workers	June 12, 2020	March 8, 2021	Extended past original 150 day effective period by JCRAR.
EmR2015 Related to: Fire and Electrical Inspections during COVID-19 pandemic	June 23, 2020	March 19, 2021	Extended past original 150 day effective period by JCRAR.

⁵ Certain federal rules have been suspended or modified under Stafford Act authority. Under the Stafford Act, federal agencies may waive conditions normally required to receive federal assistance when a major disaster is declared by the President (the President declared a major disaster existing in Wisconsin on April 4, 2020.) DCF enacted EmR2009 in response to the federal rule modifications and suspensions. However, EmR2009 will no longer be effective, and the permanent rule will apply, once the effective period for the emergency rule is exhausted under Wisconsin law, regardless of whether such requirements are still temporarily exempt under federal law.

EmR2018 Related to: Employer contribution rates for 2021 to in aid economic recovery from COVID-19	June 29, 2020	March 25, 2021	Extended past original 150 day effective period by JCRAR.
EmR2019 Related to: Certification courses for funeral director apprentices during COVID-19 pandemic	July 7, 2020	April 2, 2021	Extended past original 150 day effective period by JCRAR.
EmR2020 Related to: Building inspection requirements during COVID-19 pandemic.	July 8, 2020	April 3, 2020	Extended past original 150 day effective period by JCRAR.
EmR2029 Related to: Certification of programs for training and testing nurse aides and feeding assistants during COVID-19 pandemic.	August 10, 2020	March 7, 2021	Extended past original 150 day effective period by JCRAR.
EmR2031 Related to: Emergency medical services licensure, certification, and staffing requirements during COVID-19 pandemic	August 26, 2020	March 23, 2021	Extended past original 150 day effective period by JCRAR.
EmR2033 Related to: Medicaid eligibility requirements and compliance with FFCRA	September 3, 2020	March 31, 2021	Extended past original 150 day effective period by JCRAR.
EmR2034 Related to: Providing notification of the availability of unemployment insurance to employees at the time of separation from employment	November 2, 2020	March 31, 2021	March 31, 2021 is the end of the 150 day effective period. As such, EmR2034 is subject to possible extension by JCRAR.

EmR2040 Related to: Requirements for adult long-term care, including to qualify for increased federal funding under s. 6008 of the FFCRA	October 24, 2020	Earliest of statutory time limits (150 days plus extensions, if any) or termination of certain federal emergency periods)	The rule may terminate sooner than the statutory time limits (150 days plus extensions, if any) if the applicable federal emergency periods expire, but the rule may not exceed the Wisconsin statutory time limits.
EmR2041 Related to: relaxing certain Medicaid benefits management requirements during COVID-19 pandemic	October 26, 2020	March 24, 2021	March 24, 2021 is the end of the 150 day effective period. As such, EmR2034 is subject to possible extension by JCRAR.
EmR2042 Related to: State agency employee absences and staffing during the COVID-19 pandemic	November 9, 2020	April 7, 2021	April 7, 2021 is the end of the 150 day effective period. As such, EmR2034 is subject to possible extension by JCRAR.
EmR2043 Related to: Licensing flexibilities during a pandemic declaration and to create licensing flexibilities allowing schools to address staffing needs and educator preparation programs the latitude to address student teaching requirements in the clinical programs they offer during the 2020-21 school year as necessitated by COVID-19.	December 2, 2020	April 30, 2021	April 30, 2021 is the end of the 150 day effective period. As such, EmR2034 is subject to possible extension by JCRAR.
EmR2044 Related to: Benefit charges for initial claims related to the public health emergency declared by Executive Order 72 and requirements prescribed under 2019 Act 185.	December 7, 2020	May 5, 2021	May 5, 2021 is the end of the 150 day effective period. As such, EmR2034 is subject to possible extension by JCRAR.
EmR2046 Related to: Age waivers for general educational development tests during COVID-19 pandemic	December 15, 2020	May 13, 2021	May 13, 2021 is the end of the 150 day effective period. As such, EmR2034 is subject to possible extension by JCRAR.

EmR2102 Related to: Re-use of personal protective equipment by pharmacists during the COVID-19 pandemic	January 18, 2021	June 16, 2021	June 16, 2021 is the end of the 150 day effective period. As such, EmR2034 is subject to possible extension by JCRAR.
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CONCLUSION

If the Assembly joins the Senate in passing the Resolution, EO #104 will be terminated and ineffective. The result of the termination of EO #104 is that any emergency orders issued under the authority of EO #104 are also terminated (*i.e.*, statewide face covering requirements) and that statutory exemptions or authority resulting from a declared state of emergency are also no longer effective. However, emergency rules enacted under the authority of Wis. Stat. § 227.24 would remain in effect as emergency rules do not required a declared state of emergency to be effective.

If you have any questions surrounding this memorandum, please do not hesitate to contact us. We appreciate the opportunity to be of service to the Association and its member counties.

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