

**SUPPLEMENT TO GUIDANCE: ENFORCEMENT OF LOCAL HEALTH ORDERS
UTILIZING PROCESS SET FORTH IN THE ADMINISTRATIVE CODE**

October 14, 2020

Shortly following the Supreme Court’s decision in *Wisconsin Legislature v. Palm*, 2020 WI 42, the Wisconsin Counties Association created a task force to address questions surrounding the implementation and enforcement of local health orders under Wis. Stat. Chap. 252. In August of 2020, the task force completed its work and the Association released the publication *Guidance in Implementing Regulations Surrounding Communicable Diseases – An Analysis of Local Health Department and Local Health Officer Powers, Duties, and Enforcement Actions*. The Guidance may be found at https://www.wicounties.org/uploads/legislative_documents/guidance-communicable-diseases-final.pdf.

As indicated in the *Guidance*, local health officers are vested with the power to issue orders that are reasonable, based on local conditions, and that the local health officer deems necessary to curtail the spread of communicable diseases.¹ The orders a local health officer may issue related to communicable disease can be categorized as follows: (1) orders of general application that impact the public at large; and (2) orders that apply to a specific person, group, establishment, or gathering spot. Both policy and legal considerations suggest that the categories be treated differently in terms of how a local government and health officer craft relevant regulations, including enforcement mechanisms (*i.e.*, penalties/civil forfeitures). This Supplement addresses the challenges counties are facing with the creation of an ordinance to enforce local health orders applicable to the public at large and, as well, the enforcement mechanism discussed in the *Guidance* whereby a local health officer may petition a court to enforce a local health order pursuant to Wis. Admin. Code § DHS 145.06. Due to the challenges associated with drafting, implementing and enforcing a county ordinance related to local health orders, many counties have instead considered a “stepped” enforcement process, which is founded upon Wis. Admin. Code § 145.06. As with any consideration surrounding how a county best creates a regulatory mechanism, counties should work closely with corporation counsel to ensure compliance with all applicable laws and ordinances.

A. Enforcement Issues and Concerns Related to Orders of General Applicability

Section 252.25, relating to the enforcement of health orders issued under Wis. Stat. ch. 252, provides as follows:

¹ Local health officers also enjoy a variety of other powers and responsibilities, the discussion of which are beyond the scope of this Supplement.

Any person who willfully violates or obstructs the execution of any state statute or rule, county, city or village ordinance or departmental order under this chapter and relating to the public health, for which no other penalty is prescribed, shall be imprisoned for not more than 30 days or fined not more than \$500 or both.

(Emphasis added).

There exist two important considerations surrounding the interpretation and application of Wis. Stat. § 252.25. First, the statute provides an enforcement mechanism for local health orders only where a county has adopted a concomitant ordinance allowing for enforcement. Second, county ordinances may not provide a penalty for violation that imposes imprisonment or other criminal penalties, as the Wisconsin Legislature has limited the definition of a “crime” to only include conduct prohibited by state law. Wis. Stat. § 939.12; *State v. Thierfelder*, 174 Wis. 2d 213, 222, 495 N.W.2d 669 (1993) (holding that municipalities cannot impose imprisonment under a municipal ordinance, because municipalities cannot create crimes under Wisconsin Statutes). Based upon these two considerations, it is apparent that a county ordinance² is required to provide for the enforcement of a local health order and the penalty for noncompliance imposed by the ordinance must be a civil forfeiture, as opposed to a fine or imprisonment.³

The analysis surrounding adopting, implementing and enforcing a county ordinance relating to a local health order is further complicated by the Supreme Court’s decision in *Wisconsin Legislature v. Palm*.⁴ 2020 WI 42. The *Palm* Court opined that any actions that give rise to a “crime” “must ‘meet the standards of definiteness applicable to statutory definitions of criminal offenses.’” *Id.* (citing *State v. Courtney*, 74 Wis. 2d 705, 709, 247 N.W.2d 714 (1976)). While a civil forfeiture is not, by definition, a “crime,” the constitutional principles applicable to proceedings involving the imposition of a civil forfeiture are similar to those involved in the prosecution of a crime, as both circumstances may impact an individual’s constitutional liberties.⁵

In addition, the Court in *Palm* was concerned with what may be described as health officer regulatory overreach. Indeed, the *Palm* Court emphasized its concern with the extent of power

² Reference is made to a county ordinance, but a city or village ordinance may also provide enforcement authority for city or village health departments and joint city/county health departments.

³ In addition to a civil forfeiture, an ordinance could also make injunctive relief available as a remedy.

⁴ The *Palm* Court interpreted Wisconsin Department of Health Services authority to issue orders and rules of general application, and, therefore, is not directly applicable to local health officer authority. However, the authority granted to local health officer’s to issue orders of general application is similar to, and mostly analogous with, DHS authority. As a result, many of the issues raised by the *Palm* Court would likely also be held to apply to local health officer authority in this regard. For this reason, there is a great deal of ambiguity surrounding the scope of authority local health officers possess in issuing orders of general application, particularly the means by which such orders may be enforced. Further, legislative oversight is likely necessary in order to issue an “enforceable” order of general application, presenting further logistical and timing challenges.

⁵ For a more detailed discussion surrounding the constitutional principles, please see the *Guidance* at pp. 24-26.

that Secretary Palm would necessarily possess if no legislative oversight were required (*i.e.*, the power to create a law applicable to all people and to “subject people to imprisonment when they disobeyed her order.) *Palm* at ¶ 24. The Court acknowledged that the delegation of powers to an unelected official raised serious constitutional concerns, particularly separation of powers issues. *Id.* at ¶ 67. The same concerns exist when analyzing a local health officer’s powers – the unelected health officer should not be delegated the absolute power to declare the conduct that will give rise to a penalty (civil forfeiture) and prescribe the enforcement mechanism absent the procedural safeguards discussed in the *Guidance*.

In summary, while a local health officer may issue orders of general application that are reasonable and necessary to limit or prevent the spread of a communicable disease, the ability to enforce such orders through a forfeiture process presents challenges, both legally and practically.

B. Enforcement Actions Pursuant to Wis. Admin Code ch. DHS 145.

The Administrative Code provides an enforcement mechanism completely separate from the ordinance and forfeiture mechanism described above. Section DHS 145.06(4) provides local health officers with the authority to direct a person who is known to have or is suspected of having a contagious medical disease to comply with any of the following (singularly or in combination), as appropriate:

- (a) Participate in a designated program of education or counseling.
- (b) Participate in a defined program of treatment for the known or suspected condition.
- (c) Undergo examination and tests necessary to identify a disease, monitor its status or evaluate the effects of treatment on it.
- (d) Notify or appear before designated health officials for verification of status, testing or direct observation of treatment.
- (e) Cease and desist in conduct or employment which constitutes a threat to others.
- (f) Reside part-time or full-time in an isolated or segregated setting which decreases the danger of transmission of the communicable disease.
- (g) Be placed in an appropriate institutional treatment facility until the person has become noninfectious.⁶

In addition, Wis. Admin Code § DHS 145.06(6) empowers a local health officer to “direct persons who own or supervise real or physical property or animals and their environs, which present a threat of transmission of any communicable disease ... to do what is reasonable and necessary to abate the threat of transmission.”

Pursuant to Wis. Admin Code § DHS 145.06(5), a local health officer may petition a court of record to order a person in violation of a specific directive issued pursuant to 145.06(4) or (6) to comply. When petitioning a court, the local health officer must ensure the following:

⁶ Wis. Admin Code § DHS 145.06(4).

- (a) The petition is supported by clear and convincing evidence of the allegation;
- (b) The respondent has been given the directive in writing, including the evidence that supports the allegation, and has been afforded the opportunity to seek counsel; and
- (c) The remedy proposed is the least restrictive on the respondent which would serve to correct the situation and to protect the public's health.

Based upon these regulations and because of the challenges associated with drafting, implementing and enforcing a county ordinance related to local health orders, many counties have considered the following “stepped” enforcement process, which is founded upon Wis. Admin. Code § DHS 145.06.

Step One: A local health officer issues COVID-19 guidelines for individuals, groups, and establishments to utilize and follow that the local health officer deems reasonable and necessary to prevent the spread of the communicable disease. The authority to issue the guidelines is firmly established in Wis. Stat. § 252.03 and Wis. Admin. Code § DHS 145.06(4)(e).

The guidelines should, of course, seek voluntary compliance to ensure maximum acceptance and effectiveness. Guidelines should follow recommendations and guidance issued by recognized sources such as the Centers for Disease Control, the Occupational Safety and Health Organization, and the Wisconsin Department of Health Services, but should also be based on local conditions (an important legal requirement underlying local health officer authority based in Wis. Stat. § 252.03). For example, guidelines applicable to a “hotspot” will likely be different from those issued in a community with a lower number of cases.

When issuing the guidelines, it will be important for a local health officer to specify in as much detail as possible (1) the local conditions that led to the decision to issue the guidelines; (2) the necessity for the guidelines in the context of attempting to curtail the spread of COVID-19; (3) the reasonableness of the measures identified as guidelines; (4) the statutory and regulatory foundation for the guidelines (Wis. Stat. § 252.03 and Wis. Admin. Code § DHS 145.06); and (5) a discussion of other and further orders, directives, and/or guidelines that may result in the event COVID-19 continues to spread, including the specific directives that may be issued (pursuant to Wis. Admin. Code § DHS 145.06) for failure to comply with the guidelines when such failures result in the transmission of COVID-19.

Step Two: If COVID-19 continues to spread and there are one or more individuals, groups, or establishments that refuse to comply with the guidelines, a local health officer may then issue targeted directives applicable to a specific individual, group, or establishment or to multiple similarly situated individuals, groups, or establishments that are not following the guidelines *and*, for groups and establishments, based upon confirmed conditions that are resulting in the transmission of COVID-19. Wis. Admin. Code § DHS 145.06 refers to such targeted measures as “directives.” As a result, the local health officer should use the phrase

“directive” when issuing and, as well, discuss application of the five factors in Step One above to the particular circumstances that led to the directive being issued.

As indicated in Wis. Admin Code § DHS 145.06(4), directives issued to specific individuals may only be issued to persons who are known to have, or who are suspected of having, a communicable disease. Likewise, it is important to remember that directives issued to groups or establishments may only be issued under Wis. Admin Code § DHS 145.06(6) if the groups or establishments are known to present a threat of transmission of COVID-19. Further, such directives must be reasonable and necessary to abate the threat of transmission. For this reason, such directives should generally only be utilized when the group(s) and establishment(s) at issue fail to adhere to the guidance issued under Step One, *and* when measures such as contact tracing have established clear evidence of transmission because of the failure to adhere to the guidance. These steps are necessary in order to meet the “reasonable and necessary” threshold embedded in Wis. Stat. § 252.03 and Wis. Admin Code § DHS 145.06.

Step Three: If the targeted individual(s), group(s), or establishment(s) refuse to adhere to the local health officer’s directive issued under Step Two, the local health officer may petition the circuit court to order the individual(s), group(s), or establishment(s) to comply with the order under the process set forth in Wis. Admin. Code § DHS 145.06 discussed above.

Following the “stepped” enforcement mechanism set forth in Wis. Admin Code § DHS 145.06 likely does not implicate the primary concerns identified in the Supreme Court’s decision in *Palm*.⁷ As indicated above, the Wis. Stat. ch. 252 issues arising from the *Palm* decision relate primarily, if not exclusively, to orders of general application under Wis. Stat. § 252.02, which would seemingly likewise implicate Wis. Stat. § 252.03 (relating to local health officers.) Indeed, the procedural safeguards in the Administrative Code relating to judicial findings surrounding burden of proof, notice of the directive and the implementation of the least restrictive remedy address many of the concerns the Court identified in *Palm*. In addition, the process relies upon an enforcement mechanism explicitly contemplated in the Administrative Code, the lack of which was the primary complaint surrounding the order at issue in *Palm*.

C. Practical Considerations

The onset of the COVID-19 global pandemic is unprecedented. The reaction from federal, state and local governmental agencies around the country has likewise been unprecedented. The Wisconsin statutes and administrative code were not designed with COVID-19 in mind. For this reason, it is important that counties review their legal options carefully with corporation counsel. Similarly, it will be important for counties to discuss enforcement options and mechanisms with their local health officer, the Sheriff’s office, the courts, administration, the county board and, of

⁷ While the *Palm* decision is not implicated, the relevant statutes and administrative code nonetheless constrain what may be “ordered” to those measures deemed reasonable and necessary to suppress or prevent the spread of COVID-19. As well, and as indicated in this Supplement, there are constitutional considerations associated with the imposition of any restriction on an individual’s constitutional rights.

course, corporation counsel. In the end, it will be important to not only devise a logical and legally-defensible mechanism to slow the spread of COVID-19, but to also provide the public confidence that the county is proceeding in a reasonable manner.

If you have any questions or concerns with this Supplement, please do not hesitate to contact the Association.