

## **Supreme Court Ruling Issues Decision in *Wisconsin Legislature v. Palm*, Declares Safer at Home “Unlawful, Invalid and Unenforceable**

This afternoon, the Supreme Court issued its decision in *Wisconsin Legislature v. Palm*, in which it declared Emergency Order #28, Safer at Home, “unlawful, invalid, and unenforceable,” except that the provision in the Safer at Home Order closing schools still applies. A copy of the decision can be found online.

In a split (4-3) decision, the Court held that the Safer at Home Order is an administrative rule and, therefore, subject to the emergency rulemaking procedures established by the Legislature in Wis. Stat. § 227.24. Because Secretary-designee Palm did not follow those emergency rulemaking procedures, the Safer at Home Order is unlawful.

Importantly, while several Justices agree that the impact of the decision should be stayed (delayed) for a period of time to allow for promulgation of rules embodying the public health and safety concepts in the Safer at Home Order, the Court seemingly did not order a stay (although the author of the majority opinion has indicated support for a stay.) This means that the Supreme Court’s decision is effective immediately and all elements of the Safer at Home Order, with the exception of school closings, are of no force and effect.

The Court’s decision raises several issues that counties will need to confront in the coming hours and days. These issues include:

1. Validity of Local Health Orders. Many local health officers have issued orders under the authority granted by Wis. Stat. § 252.03 and other local health officers may be contemplating the issuance of orders similar to the Safer at Home Order. While Wis. Stat. § 252.03 provides a local health officer with broad regulatory authority, enforcement of local health orders proceeds under the same statute relating to enforcement of statewide orders like Safer at Home – Wis. Stat. § 252.25. This is the same statute that the Court cited in its decision as problematic in terms of enforcement of the Safer at Home Order. As a result, it is unclear whether a local health order would, in the Court’s view, suffer from the same deficiencies that caused the Court to invalidate the Safer at Home Order.
2. Emergency Rulemaking. The Court indicated that Secretary-designee Palm has the ability under Wis. Stat. § 227.24 to promulgate emergency rules related to Safer at Home. The emergency rulemaking process significantly shortens the process by which administrative rules are promulgated and involves eight (8) steps. The Legislative Council’s analysis of the emergency rulemaking process can be found online. At this point, it is unclear how quickly Secretary-designee Palm may act to

implement emergency rules related to the concepts embodied in the Safer at Home Order.

3. Further Orders from Governor Evers and Secretary-designee Palm. Both Governor Evers and Secretary-designee Palm have issued a number of orders over the past 60 days relating to the COVID-19 pandemic. Many of the orders have either expired or were based upon similar statutory authority as that of the Safer at Home Order. It is unclear which of the Orders are currently in effect and, for that matter, what further Orders may be forthcoming to address topics addressed in the previous Orders including the Safer at Home Order.

The Association and its general counsel are continuing to review the Court's decision and, as well, other statutes, rules and regulations in an effort to provide additional information and guidance regarding the issues identified above and any other issues that arise. If you have specific questions or concerns surrounding the Court's decision and its impact on counties, please email the Association so we can be sure they are addressed.

Together, we will find solutions that work for counties and the citizens we serve.