

THOUGHT LEADERSHIP

LEGAL UPDATES

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Wisconsin Supreme Court Strikes Down Wisconsin's Safer at Home Order

Yesterday, the Wisconsin Supreme Court ruled that Wisconsin's Safer at Home Order, Emergency Order #28 was unenforceable for two reasons: The order is invalid (1) because it is an administrative "rule" that was not promulgated in accordance with Wisconsin's Administrative Procedure Act; and (2) because the order exceeds the Department of Health Services' (DHS) statutory authority.

As a result of the court's decision, Wisconsin's Safer at Home Order is immediately unenforceable except as to the closure of public and private K-12 schools for the remainder of the school year. The court declined to define the precise scope of DHS authority, but determined that the Safer at Home Order was beyond the bounds of that authority.

The court concluded that the Safer at Home Order is an administrative "rule" because it "regulates all persons in Wisconsin at the time it was issued and it regulates all who will come into Wisconsin in the future." The court rejected DHS's argument that an emergency rule cannot deal with the type of circumstance the state faces here. The court held that, "[n]ecessarily under Ch. 227 you're dealing with a rule that's time limited and necessarily you're dealing with a rule that's responding to a new set of circumstances and is prospective."

The court also ruled that the order is invalid because it exceeds DHS's authority in Chapter 252. The court ruled that DHS cannot rely on 252.02(6) to impose criminal penalties because that provision "does not have the specificity required for fair notice of the conduct required or prohibited." The court held that the order also goes well beyond what is authorized by 252.02(4) because it: (a) quarantines "all individuals present within the State of Wisconsin by ordering them to stay at home or at their place of residence

with exceptions [DHS] deems appropriate”; (b) prohibits gatherings even of people who are not infected or suspected of being infected; and (c) prohibits all travel, not just travel “necessary to guard against the introduction of any communicable disease into the state.” The court further held that nothing in 252.02(4) gives DHS the authority to close all businesses it deems non-essential.

To reach its decision, the court also relied on Wisconsin’s Administrative Procedure Act, which “prevents agencies from circumventing this new ‘explicit authority’ requirement by simply utilizing broad statutes describing the agency’s general duties or legislative purpose as a blank check for regulatory authority.” The majority described Act 21 as a “legislatively-imposed canon of construction that requires us to narrowly construe imprecise delegations of power to administrative agencies.”

If DHS seeks to issue a similar order in the future, it will need to work directly with the legislature in promulgating an emergency or enacting legislation relating to reopening. The Governor’s Emergency Declaration expired on May 11, 2020. If the Governor seeks to implement the same order through his emergency powers, he would need to declare another emergency. Under Wisconsin law, the legislature may, by joint resolution, suspend the Governor’s Emergency Declaration.

What does this mean for your business?

This ruling means that there is nothing from the State of Wisconsin that currently prevents a business (other than schools) from reopening or operating at this time.

However, every Wisconsin business/organization should proceed with caution and with advice of counsel prior to changing their current operations. While the order has been invalidated, there remains significant public safety concerns, which have been acknowledged by the Wisconsin legislature and DHS throughout this legal challenge. We anticipate the Wisconsin legislature, Governor Evers and DHS will likely promulgate new rules in the very near future regarding the reopening of businesses and lifting of current Safer-at-Home restrictions.

In recent days the legislature has publicly advocated for a regional reopening approach that would be crafted based on incidences of COVID-19 in any particular area of the state, and would allow a more rapid reopening for those parts of the state with low incidences than other parts of the state harder hit by the disease.

As we await further guidance from the state, we recommend that all businesses analyze applicable local government restrictions that may be in place through local orders. Businesses may also consult guidelines from the CDC and best practices from the Wisconsin Economic Development Corporation (WEDC).

Contact us

If you have any further questions or require more information regarding this update, please contact Mindi Giftos, Eric McLeod, Lane Ruhland or your Husch Blackwell attorney.

COVID-19 Return-to-Work Resource

For the many businesses that partially or completely shuttered their on-site operations due to government-mandated COVID-19 orders, transitioning employees back to the workplace is an unprecedented and complex endeavor. Husch Blackwell's Return-to-Work Resource Center provides best practices, answers to common questions and potential issues to consider.