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To: Lieske Giese, Health Officer and Incident Commander

From: Jenessa Stromberger, Assistant City Attorney and Legal Officer

Subject: Authority and Legal Restrictions Related to Local Health Orders

The following is an overview of the relevant statutory authority as well as constitutional considerations that must inform and guide the issuance of a local health order. Local health officers do not enjoy unlimited authority to issue local health orders. Local health orders are only legally enforceable if they are consistent with a variety of legal requirements, and thus any local health order should be carefully crafted in consultation with legal counsel to ensure legality and enforceability.

Wisconsin Statute §252.03 authorizes local health officers to issue local health orders provided certain conditions are met, and the scope of the order does not exceed legal requirements. This section describes the three primary duties of the local health officer when confronted with a communicable disease outbreak in their jurisdiction: (1) investigate; (2) report; and (3) act.

Each of these duties is established by statute and further guidance on the interpretation of this statute in general, and these duties specifically, may be forthcoming in the Wisconsin Supreme Court case *Wisconsin Legislature v. Andrea Palm*. This case has been briefed, and the court has heard oral argument. A decision is expected to be released soon.

In addition to the requirements and duties found in Wisconsin Statute §252.03, any local health order must comply with constitutional requirements. Two additional cases provide guidance on some of the constitutional issues which may be implicated by local health orders.

Fabick v. Palm, is pending in the Wisconsin Supreme Court challenging the constitutionality of Wisconsin executive orders related to COVID-19. This lawsuit challenges the order's: (1) restrictions on the free exercise of religion; (2) restrictions on speech and assembly; and (3) restrictions on travel. Similar to state issued health related orders, local health orders must also comply with constitutional requirements to be legally enforceable.

In addition to the *Fabick* lawsuit, TESLA has brought a lawsuit against Alameda County, California challenging a local health order on constitutional grounds. *Tesla v. Alameda County* alleges the local health order violates the Due Process clause of the United States Constitution, violates the Equal Protection clause of the United States Constitution, and is preempted by state law. The constitutional and legal requirements found in these cases are not an exhaustive list of potential issues, but provide guidance on avoidable pitfalls in public health orders to maintain legality and enforceability.

Authority to issue local health orders under Wis. Stat. § 252.03

Investigate

The first element of local health officer authority and duty when faced with a communicable disease is to investigate its source and related circumstances. *Wis. Stat. §252.03(1)*. The local health officer has the obligation to “investigate all the circumstances” upon the appearance of communicable disease. *Id.* The key word is circumstances – it means there must be an understanding of the local situation, which would then provide the basis for any evidence-based local health order. Also in *Wis. Stat. §252.03(1)* there is express authority to investigate schools and public buildings to assess the sanitary condition of them. Other places held open to the public may also be included, though if an owner does not grant permission it may be necessary to obtain a special inspection warrant pursuant to *Wis. Stat. §66.0119*. Inspection authority is enhanced by *Wis. Stat. §252.03(4)*, which states “no person may interfere with the investigation under this chapter of any place or its occupants.” This admonishment does not create the authority to enter private property without permission or a special inspection warrant, but is a strong additional basis to obtain inspection warrant of private property if denied after an attempt for consensual inspection.

Report

The second element of local health officer authority and duty when faced with a communicable disease occurs after both the initial investigation and after issuing any necessary local health order. Pursuant to *Wis. Stat. §252.03(1)-(2)*, the local health officer shall make a report to the “appropriate governing body” and to the Wisconsin Department of Health Services.

Act/Issuance of Local Emergency Orders

The third, most critical and most publicly visible element is that of action through the issuance of a local emergency order. After completing an investigation and a report, a local health officer may do what is both reasonable and necessary for the prevention and suppression of the communicable disease. *Wis. Stat. §252.03(2)*. *Wis. Stat. §252.03(1)* also uses the word “necessary.” This grant of authority is relatively broad, but is limited by the required factual investigation outlined above, and the fact that measures must be both reasonable and actually necessary for prevention and suppression of the disease, and must also comply with constitutional requirements as outlined below. A local order must be narrowly tailored to target how the disease is actually spreading locally, as informed by the completed investigation. The only specific action described in the statute is that of public gatherings, which may be forbidden if, again, meeting the standard of both reasonable and necessary based on the investigation of local conditions. *Wis. Stat. §252.03(2)*.

Case law interpreting *Wis. Stat. Cha. 252* is scant, likely because it is, thankfully, rarely used. However, a case against the City of Milwaukee in 2007, *City of Milwaukee v. Washington*, 2007 WI 104, 304 Wis. 2d 98, provides useful insight as to how a court may apply Chapter 252. In that case, the court considered options for containment of an individual with potentially contagious tuberculosis, to determine that there were no less restrictive alternatives available than the jail that was ultimately used. *Id.* at ¶¶1-3. A court applying the “reasonable and necessary” standard may apply a similar test to that in *Washington*, and examine other possible options to determine whether the least restrictive option was chosen.

Finally, enforcement of a local health order is reserved to the local authorities. *Wis. Stat. §252.03(3)*. Locally, that implicates the County and all the cities and villages within it with law enforcement personnel. If a jurisdiction chooses not to enforce an order, recourse for the local health officer is to report the issue to DHS, which then has certain authority to act under state law, as may be further informed by the pending Wisconsin Supreme Court litigation.

Constitutional Requirements

Within the statutory framework described above, any local health order must be carefully drafted to ensure compliance with constitutional limitations. Courts take an especially critical view of government actions which implicate fundamental rights.¹ Fundamental rights implicated by the state's "Safer at Home" order include freedom to travel, freedom of religion, freedom of assembly, and freedom of speech. Where a government action implicates a fundamental right, the action must satisfy a "strict scrutiny" standard.² To satisfy strict scrutiny, the government must demonstrate its action furthered a "compelling governmental interest," and that the action, in this case the local health order, is "narrowly tailored" to achieve that interest.

A local health order designed to stop the spread of COVID-19 likely qualifies as a "compelling governmental interest" and a local health officer has the authority to restrict these fundamental rights, if narrowly tailored to pass strict scrutiny. A government action is narrowly tailored if it precisely places as few restrictions as possible on constitutional liberties.³ Additionally, the government must demonstrate that it did not choose a means that *unnecessarily* burdens or restricts a constitutional liberty.^{4 5} In short, where the freedoms of travel, speech, assembly, or religion can implement social distancing and other protective measures which prevent any meaningful exposure to the transmission of COVID-19, stricter restrictions likely cannot survive constitutional scrutiny.⁶

¹ *State v. Martin*, 191 Wis. 2d 646, 652, 530 N.W.2d 420, 422-23 (Ct. App. 1995).

² Leslie Kendrick, *Content Discrimination Revisited*, 98 Va. L. Rev. 231, 237 (2012); *see also Free Speech Doctrine After Reed v. Town of Gilbert*, 129 Harv. L. Rev. 1981 (2015) (noting most government actions fail to satisfy strict scrutiny).

³ *State v. Crute*, 2015 WI App 15, ¶ 30, 360 Wis. 2d 429, 445-46, 860 N.W.2d 284, 292

⁴ *Dunn v. Blumstein*, 405 US 330 (1972).

⁵ Simply put, it is not enough for a government action implicating fundamental rights to be well intentioned or targeted at a worthy goal. If it is broader than necessary it likely will not survive strict scrutiny. In this way, the judicial analysis on fundamental rights is somewhat similar to the analysis of Wis. Stat. §252.03. Both examine whether the government action is "necessary" – meaning there is no less restrictive alternative - not merely if there is a rational basis for taking the action. And again, the action taken must be necessary based on the local condition, requiring specific tailoring based on the results of the investigation undertaken by the local health officer pursuant to Wis. Stat. §252.03.

⁶ The right to travel intrastate is fundamental among the liberties protected by the Wisconsin Constitution. *Brandmiller v. Arreola*, 199 Wis. 2d 528, 539, 544 N.W.2d 894 (1996). The right to travel is interwoven with the full enjoyment of other fundamental rights retained by the people including the right of assembly. *Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("freedom of travel throughout the United States has long been recognized as a basic right under the Constitution."). Article I, Section 4 of the Wisconsin Constitution guarantees that the right of the people to peaceably assemble, and to consult for the common good shall never be abridged. Article I, Section 3 of the Wisconsin Constitution prohibits the government from taking actions which restrain or abridge the freedom of speech. The right to practice one's religion according to the dictates of conscience is a fundamental right. *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶ 32, 320 Wis. 2d 275, 768 N.W.2d 275, 768 N.W.2d 868. Article I, Section 18 of the Wisconsin Constitution expressly states that the Government may not prescribe or proscribe any particular mode of worship. Many of the rights are explicitly protected by the U.S. Constitution as well.

Equal Protection

Equal protection prohibits administering laws in a manner which treats similarly situated people differently.⁷ Equal protection requires that there exist reasonable and practical grounds for the classifications drawn.⁸ “Where a ‘fundamental right’ or ‘suspect class’ is involved, the challenged law must pass strict scrutiny,”⁹ meaning, as discussed previously, that the restriction must be narrowly tailored to meet the governmental interest.

In a public health context, local health orders must treat similarly situated persons and businesses the same. For example, a local health order that allows some businesses to stay open but requires similar businesses to close may violate equal protection. Part of Tesla’s lawsuit asserts that Alameda County’s local order violates the U.S. Constitution’s Equal Protection clause because its distinctions regarding which business are permitted to continue operations are arbitrary and without a rational basis.

Due Process and Vagueness

The 14th Amendment Due Process Clause provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” A State “violates this guarantee by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.”¹⁰ A law which fails to provide fair notice of required or prohibited conduct, and fails to provide standards for those who enforce law and adjudicate guilt is unconstitutionally vague.¹¹

If one cannot tell what conduct is prohibited by a local health order and what conduct is permitted, the local health order may violate due process or be unconstitutionally vague. Vagueness is one of the challenges with the Safer at Home order. A local health order must be precise in its language and application in order to leave no room for doubt as to permitted and prohibited action in order to avoid constitutional Due Process violations.

Conclusion

Broad authority is granted to local health officers to act as is “reasonable and necessary” in order to contain and suppress the transmission of communicable disease. This action must be premised upon the result of investigation of local conditions and narrowly tailored as is constitutionally required to target the local condition. A report of investigation and action must be made to the local governing body and to DHS, pursuant to Wis. Stat. §252.03. A local health order written in these statutory and constitutional provisions will result in an order that is both enforceable and lawful.

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⁷ *Engquist v. Ore. Dep’t of Agr.*, 553 U.S. 591, 602 (2008).

⁸ *State v. McManus*, 152 Wis. 2d 113, 130, 447 N.W.2d 654, 660 (1989).

⁹ *Szarzynski v. YMCA, Camp Minikani*, 184 Wis. 2d 875, 886, 517 N.W.2d 135, 139 (1994).

¹⁰ *Johnson v. U.S.*, 135 S. Ct. 2551, 2556 (2015).

¹¹ *State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654, 662 (1989).