

STATEMENT OF SCOPE

Department of Health Services

Rule Ch. : DHS 145

Relating To: Establishing protections for Wisconsin citizens by maintaining appropriate social distancing or other measures to slow and contain the spread of COVID-19 and protect health and safety, while turning the dial to reopen Wisconsin's economy.

Rule Type: Emergency

1. Finding/ Nature Of Emergency:

The Department of Health Services ("DHS") seeks to promulgate new emergency rules to address the public health emergency created by the SARS-CoV-2 virus ("COVID-19") in the State of Wisconsin. Governor Evers formally declared a state of emergency (consistent with all other states, as well as the federal government) on March 12, 2020, in Executive Order #72. This is an unprecedented public health emergency, with no vaccine available to prevent infection. The State of Wisconsin has been working tirelessly to address the crisis.

In Executive Order #72, Governor Evers declared a state of emergency, designated DHS as the agency leading the State of Wisconsin's response, and authorized the Adjutant General to activate the Wisconsin National Guard. On March 16, 2020, the State Emergency Operation Center ("SEOC") moved its status to Level 1 and began mobilizing the resources of state government and partners around the State of Wisconsin to confront the crisis. State of Wisconsin employees—including public health physicians, epidemiologists, public health educators, statisticians, logistics specialists, project managers, National Guard service members, human resource specialists, IT professionals, procurement and accounting staff, and more—have been working seven days a week to coordinate and execute the State of Wisconsin's response. Multiple taskforce teams are focusing on immediate response efforts related to isolation facilities, hospital surge planning, personal protective equipment ("PPE") procurement and logistics, PPE decontamination, community and targeted testing, rapid incident response, laboratory capacity and specimen collection, contact tracing and surveillance, and much more.

This emergency has overwhelmed the country and cost many lives. One of the most troubling issues about COVID-19 is that it is highly contagious and can even be spread by infected individuals who have no symptoms. COVID-19 is highly transmissible via respiratory droplets released when an infected person coughs, sneezes, speaks, or

breathes. Infectious particles—which again may be shed in large quantities by someone with no symptoms at all—can remain in the air and on surfaces for an extended period, but the precise duration remains unknown. Because there is no vaccine currently, the primary weapon that any state, including Wisconsin, has to control and minimize the spread of the disease is reducing the amount of physical contact between persons until sufficient mitigation strategies and techniques are fully in place. As a result, states and nations have implemented "social distancing" requirements as a key strategy for interrupting chains of transmission within communities. These requirements include limiting close contact between members of different households, encouraging people to stay home, maintaining six feet between people, frequently washing hands, covering coughs or sneezes, regularly cleaning high-touch surface, and not shaking hands.

Without such measures, COVID-19 infects communities at an exponential rate, with each infected person infecting between 2.2 to 3.6 other persons (by comparison, the H1N1 flu had a rate of 1.4 to 1.6). Almost 11,000 people have tested positive for COVID-19 in Wisconsin and more than 400 people have died so far. Nationally, more than 1.4 million people have tested positive for COVID-19 and more than 84,000 people have died from COVID-19 so far this year. By comparison, approximately 34,000 Americans died from influenza during the 12-month 2018-19 influenza season without any social distancing measures. Worldwide, more than 3.68 million people have tested positive for COVID-19 and more than 297,000 people have died.

In response to this worldwide pandemic, every state in the nation has declared a state of emergency. On March 24, 2020, Governor Evers and DHS Secretary Palm issued Emergency Order #12 ("Safer-at-Home Order") which instructed Wisconsin citizens to stay at home until April 24, 2020, with certain exceptions for essential activities and businesses. At that point, similar emergency orders had already been issued in many other states across the country, including in California, Delaware, Hawaii, Illinois, Indiana, Louisiana, Michigan, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Washington, and West Virginia. Currently, 41 other states have had such orders.

When the Safer-at-Home Order was issued on March 24, 2020, the number of Wisconsin citizens testing positive for COVID-19 was doubling every 3.4 days. By April 14, 2020, that rate of doubling had fallen to about every 12 days. It is evident that, absent the Safer-at-Home Order, uncontrolled spread of COVID-19 would have had a much more significant impact on public health in Wisconsin, with the most critical impacts falling upon frontline healthcare providers and Wisconsinites most susceptible to severe COVID-19 disease. It has been demonstrated that, when such uncontrolled spread has occurred in other places such as Spain and Italy, healthcare systems have had to ration resources, supplies of PPE and ventilators have been exhausted, and many healthcare workers have gotten sick and died.

On April 16, 2020, DHS issued Wisconsin's Emergency Order #28, which extended the Safer-at-Home Order ("Safer-at-Home Extension") through May 26, 2020. Emergency Order #28 followed the same general framework as the Safer-at-Home Order, while,

based on risk, relaxing some restrictions so that more businesses may reopen and more activities may resume. With the Safer-at-Home Extension, Wisconsin became one of multiple states to extend such an order into mid-to-late May. Most notably, Wisconsin's neighboring states of Illinois, Michigan, and Minnesota have also done so.

On May 13, 2020, the Wisconsin Supreme Court issued a split decision in *Wisconsin Legislature v. Palm*, 2020AP765-OA. The majority opinion held that the Safer-at-Home Extension order was a rule subject to statutory emergency rulemaking procedures established by the Legislature. The Court also held that certain provisions in the Safer-at-Home Extension went beyond what is authorized by particular subsections in Wis. Stat. § 252.02. The Court also indicated, however, that it was not defining the precise scope of DHS's authority under that statute.

The decision in *Wisconsin Legislature v. Palm* makes it necessary for DHS to engage in emergency rulemaking in order to address the ongoing public health crisis caused by the COVID-19 pandemic. and the public health crisis, DHS proposes emergency rulemaking in ch. DHS 145 to address the significant threat to Wisconsin citizens and attempt to bring the outbreak under control, while turning the dial toward reopening the economy. Without such emergency rules, the health care providers of Wisconsin could be overwhelmed and Wisconsin citizens subjected to additional and preventable sickness, suffering, and death.

2. Detailed Description Of The Objective Of The Proposed Rule:

The proposed emergency rule is intended to balance two complementary objectives: (1) "boxing in" COVID-19 to limit its spread to healthy Wisconsinites; and (2) reopening and support of the Wisconsin economy without creating undue risk of spreading the virus and thereby causing additional long-term economic disruptions.

With regard to the first objective, the goal is to suppress and contain the spread of COVID-19, to save lives and prevent the State of Wisconsin's health care system from being overwhelmed; to allow time for the continued production and deployment of expansive testing, contact tracing, and development of stores of scarce resources (such as ventilators, and PPE); and to create safe environments and reasonable measured increments of relaxing social distancing requirements, while maintaining measures that have been proven to slow and contain the spread of COVID-19. The proposed rule is likely to include a variety of temporary measures in ch. DHS 145 designed to achieve that goal consistent with the decision in *Wisconsin Legislature v. Palm*, including, but not limited to: limitations on the number of persons in a given confined space; requirements for social distancing; limitations on mass gatherings; and basic safeguards for businesses to protect employees and visitors.

With regard to the second objective of turning the dial toward reopening the economy, the proposed rule may establish a phased approach to reopening Wisconsin's economy and society, with each phase being incrementally less restrictive on businesses and individuals while protecting the public from COVID-19.

3. Description Of The Existing Policies Relevant To The Rule, New Policies Proposed To Be Included In The Rule, And An Analysis Of Policy Alternatives:

Because there is no vaccine and no treatment for COVID-19 there is presently no viable alternative to the kinds of social distancing, reducing in-person contact, and related measures to control the spread of the disease that have been adopted in most states. Procedurally, the only alternative to proceeding with emergency rulemaking would be legislative action to address the goals of the proposed emergency rule.

The proposed rule may model Wisconsin's phased reopening plan on federal guidelines that suggest states take a phased approach to reopening. The federal guidelines recommend a three-phase approach with a focus on downward trajectory of symptoms and cases, as well as having robust systems in place for the State of Wisconsin's hospitals. DHS previously articulated such an approach in Emergency Order #31, the Badger Bounce Back, which was designed to work in tandem with Emergency Order #28. Accordingly, the proposed emergency rule may re-articulate some or all the parameters specified in Badger Bounce Back and balance them against the goals inherent in the Safer-at-Home Extension, consistent with the Supreme Court's order. The proposed rule may also look at other models and guidelines for social distancing and reopening Wisconsin, including the approaches taken by other states. The proposed rule will recognize that opening up the economy without thoughtful evaluation of the risk of infection to Wisconsin citizens could cause the rate of infection to spike, deteriorating the progress that has been made, and potentially triggering extensive spread of COVID-19. The proposed rule will implement measures to reduce and slow the rate of infection of COVID-19, to reduce strain on the health care system, to mitigate economic hardship, and to save lives.

4. Detailed Explanation Of Statutory Authority For The Rule (Including The Statutory Citation And Language):

DHS has the explicit authority and duty to make rules to protect the public in the event of an outbreak of a communicable disease under s. 252.02, Stats.:

252.02 Powers and duties of department.

...

(3) The department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.

(4) Except as provided in ss. 93.07(24)(e) and 97.59, the department may promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, for the control and suppression of communicable disease, for the quarantine and disinfection of persons, localities and things infected or

suspected of being infected by a communicable disease and for the sanitary care of jails, state prisons, mental health institutions, schools, and public buildings and connected premises. Any rule or order may be made applicable to the whole or any specific part of the state, or to any vessel or other conveyance.

...

(6) The department may authorize and implement all emergency measures necessary to control communicable diseases.

The department's rulemaking and emergency rulemaking authority is further provided in ss. 227.11 and 227.24, Stats.:

227.24 Emergency rules; exemptions.

(1) Promulgation

(a): An agency may, except as provided in s. 227.136 (1), promulgate rule as an emergency rule without complying with the notice, hearing, and publication requirements under this chapter 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.

227.11 Agency rule-making authority.

...

(2) Rule-making authority is expressly conferred on an agency as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

- 1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.*
- 2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.*
- 3. A statutory provision containing a specific standard, requirement, or threshold does not confer rule-making authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.*

Under these statutes, DHS is explicitly delegated the authority to promulgate rules as necessary for the control and suppression of communicable disease in this state, including COVID-19, and for the quarantine and disinfection of persons, localities, or things infected or suspected of being infected by COVID-19. DHS further has clear, broad, and explicit authority to close schools and forbid public gatherings in schools, churches, or other places. This statutory delegation of authority does not impose any bright-line rule as to the gathering sizes DHS may require or on the places where such limits may be put into effect. Instead, DHS is authorized to impose such controls to the extent DHS finds they are necessary to “control outbreaks and epidemics.” DHS is further granted the explicit authority to implement all other emergency measures necessary to control communicable diseases, and DHS has explicit authority to make its rules applicable to the whole or any specific part of the state.

The majority opinion in *Wisconsin Legislature v. Palm* held that the Safer-at-Home Extension order was a rule subject to statutory emergency rulemaking procedures, and thereby affirmed DHS’s rulemaking authority under Wis. Stat. § 252.02. The majority also held that certain provisions in the Safer-at-Home Extension went beyond what is authorized by particular subsections in Wis. Stat. § 252.02, but did not define the precise scope of DHS’s authority under that statute.

In drafting the proposed rule, part of DHS’s decision process will include a determination of which measures DHS finds are necessary to control the spread of COVID-19 and to prevent and control further outbreaks of the disease, within applicable constitutional and statutory limits. Due to the demonstrated communicability of COVID-19 and the potential for deadly effects if COVID-19 is allowed to spread unchecked, DHS has determined that continued social distancing and other measures to be considered as described above will be necessary going forward to control the spread of COVID-19 and ensure the health, safety, and welfare of the people of Wisconsin.

Finally, like all agencies, DHS has been delegated the explicit statutory authority to promulgate rules interpreting the provisions of any statute enforced or administered by” DHS, to the extent that DHS “considers it necessary to effectuate the purpose of the statute.” Wis. Stat. s. 227.11 (2) (a). The emergency rules drafted pursuant to this statement of scope will interpret provisions of chapter 252 of the Wisconsin statutes to the extent necessary to effectuate the purpose of those statutes.

5. Estimate Of Amount Of Time That State Employees Will Spend Developing The Rule And Of Other Resources Necessary To Develop The Rule:

Due to the nature of the emergency, DHS will proceed as quickly as possible to develop the rule. DHS estimates that it will take an indeterminate number of hours to develop this emergency rule due to the novel situation and the constantly changing and uncertain nature of the pandemic. Beyond state employee time, additional resources may be required to ensure that the rule adequately protects the lives of Wisconsinites.

6. Entities Potentially Affected By Proposed Rule:

Entities that may be affected include the following: Wisconsin residents, at large; Wisconsin businesses and non-profit organizations; Wisconsin schools and universities; libraries; public health operations; first responders; tribal and local governments; and the health care industry.

7. Summary And Preliminary Comparison With Any Existing Or Proposed Federal Regulation That Is Intended To Address The Activities To Be Regulated By The Proposed Rule:

None. Federal law has not established any safer-at-home rules or regulations, nor any regulations for the process of reopening. DHS knows of no existing or proposed federal regulation that addresses the activities of this rule.

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Date Submitted