

## 2020 Year in Review: COVID-19 Legal Issues

—Andrew T. Phillips & Bennett J. Conard, von Briesen & Roper, s.c.

Counties throughout the state have faced unprecedented challenges this year in confronting the COVID-19 pandemic, including a host of new legal issues. From local health officer authority and communicable disease suppression to county government operations and employment issues, counties have seen it all in 2020. In keeping with the theme of this issue of the *Wisconsin Counties* magazine, this article will provide a brief overview of the legal challenges addressed by the Wisconsin Counties Association (WCA) and Wisconsin's counties this year.

### 2020 State Law Issues

When the COVID-19 pandemic reached the United States and Wisconsin in March, a flood of legal issues arose. The most immediate issues involved county declarations of an emergency and understanding local health officer authority in relation to the measures that could be implemented to suppress the spread of communicable diseases such as COVID-19. The association and von Briesen & Roper, s.c., its General Counsel, acted to address these issues by hosting a town hall style webinar and also by releasing a legal memorandum providing guidance on local health officer statutory authority. In the days, weeks, and months that followed, the landscape continued to evolve dramatically with the Governor and DHS issuing Executive Orders and Emergency Orders addressing the pandemic. Governor Evers issued Executive Order #72 and a multitude of emergency orders followed. The various emergency orders addressed a variety of issues,

from child care regulations, to unemployment insurance, to limitations on mass gatherings, and eventually including Emergency Order #28 (Safer at Home Order). The association and von Briesen kept pace to provide real-time information and guidance to counties, and also worked directly with the Governor's office to ensure counties and other local governments had a say in which of their services and employees would be considered "essential" during the duration of the Safer at Home Order.

The landscape shifted then dramatically with the Wisconsin Supreme Court's decision in *Wisconsin Legislature v. Palm*, 2020 WI 42, which vacated the Safer at Home Order. The decision left the responsibility to address the public health and communicable disease aspects of



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the pandemic squarely on local health officials. Not only did this situation create a patchwork of local orders and rules, but it created confusion and a lack of understanding of what local health officers could and could not do. The resulting disorder is the fault of no county or local health department. The legal landscape of Wis. Stat. ch. 252 was ill-defined to begin with given the unique circumstances the pandemic presented, and the waters were only muddied further by the *Palm* decision.

As a result of the *Palm* decision and the resulting confusion, WCA formed a task force of various stakeholders throughout the state to create guidance and recommendations for local health officers to face the pandemic. The guidance was released in August 2020 and provided a robust analysis of local health officer authority under Wis. Stat. ch. 252 and measures and best practices to utilize during a pandemic.<sup>1</sup>

As noted above, a host of other state legal issues affecting county government emanated from the Governor's various Executive Orders and the Governor's and DHS's Emergency Orders. In March, April, and May, these issues included temporary changes to childcare regulations, unemployment insurance and related benefits, healthcare provider credentialing, temporary bans on eviction and foreclosure actions, and the reinstatement of WRS annuitants, among others. Perhaps most notably, the operation of the Spring Election (and whether the election would even be held) was a major issue and potential problem for county governments. In particular, the failure to hold the Spring Election potentially would have had a major impact on county governments because there are no county boards in the state with staggered terms.

Importantly, county supervisors (and many other county elected officials) only serve through the expiration of their term and not until a successor is elected and qualified. The association and von Briesen addressed this issue and provided support to counties to help safely and successfully hold the Spring Election.

While the issuance of new Executed Orders and Emergency Orders was limited after the *Palm* decision, several new orders were issued by the Governor and DHS in August, September, and October. In August, the Governor enacted a face covering mandate throughout the state. The Governor subsequently issued a new Executive Order in September declaring another state of emergency and a new face covering mandate until November 21, 2020. Additionally, the Governor issued a new Executive Order limiting capacity in most public places to 25%. This order was immediately challenged and eventually enjoined by the Wisconsin State Court of Appeal. The association and von Briesen have and continue to provide updates and legal guidance on the face covering mandates and capacity limitations, including ongoing litigation seeking to set aside the orders.

Another important state law development was the Legislature's enactment of 2019 Act 185. Act 185 permitted property tax payment deferrals from many residents of the state. However, certain procedural actions were required of counties in order for a county's residents to qualify. Other issues also involved the settlement process utilized by counties to allocate property tax receipts to municipalities and school districts. This presented a particular challenge because the settlement date did not change despite the deferred property tax due date. The association and von Briesen worked

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with counties to develop sound approaches to these issues in order to best serve each county's residents.

### **2020 Federal Law Issues**

In addition of the state law developments in 2020, there were also a number of significant federal law issues as well. A series of federal laws, including the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) were passed by Congress and signed into law in March 2020. FFCRA and the CARES Act presented numerous changes to employment law (particularly expanded FMLA leave) and unemployment insurance considerations for counties. This landscape evolved significantly in the days and weeks after enactment as county governments, WCA and von Briesen worked quickly to interpret the new laws and also apply U.S. Department of Labor (DOL) rules and guidance as they were issued. The applicable rules in this area continue to evolve in light of federal court litigation and revised DOL rules in response to such litigation. The association and von Briesen have provided, and continue to provide, significant guidance and analysis on these issues as well as various webinar presentations.

### **County Government Emergency Declarations & Operations**

The association and von Briesen have also issued guidance regarding county emergency declarations and ongoing operations. This includes guidance on how and when a county emergency declaration may be made and what the declaration may be made

in response to. Analysis and guidance on ongoing county operations, including how to provide services during the pandemic, facility operations, etc., was also made available to counties. Most significantly, guidance on virtual meetings was issued in March and April as many county board and committee meetings (including county organizational meetings) went virtual. In particular, this included guidance on how to hold virtual meetings in compliance with the Wisconsin Open Meetings Law. Counties should carefully review this guidance in order to prepare for the possibility of more virtual meetings as COVID-19 case counts continue to rise throughout the state.

### **Conclusion**

County governments throughout the state have faced extraordinary issues in 2020, including the host of legal issues discussed in this article. Counties should continue to utilize the legal resources issued by WCA and von Briesen as the COVID-19 pandemic continues and to request assistance as new issues arise. If you have any questions about the legal issues raised in 2020 by the COVID-19 pandemic, or any other governmental law needs, please contact WCA ([wicounties.org](http://wicounties.org)) or any member of the von Briesen & Roper Government Law Group ([vonbriesen.com](http://vonbriesen.com)). ♦

### **Endnotes**

1 The Guidance is available at: [wicounties.org/uploads/legislative\\_documents/guidance-communicable-diseases-final.pdf](http://wicounties.org/uploads/legislative_documents/guidance-communicable-diseases-final.pdf)