

PROTOCOL & PROCESS

County and Local Government Authority in a Time of Emergency

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As we have come to learn over the past 14 months, an emergency is wholly unpredictable in terms of both its nature and its duration. And no two emergencies are alike – a global pandemic creates different issues and concerns than a local flood. But in all situations requiring an emergency response from counties and local government, the protocol and process for responding to the emergency is founded upon Wis. Stat. Chap. 323.

The “trigger” allowing for a county or local government’s exercise of emergency powers is a declaration of a state of emergency. A state of emergency may be declared either by the Governor or by a local government (including counties). It is important to understand a local government’s powers and duties differ depending on whether the state of emergency was declared by the Governor or by the local government.

Emergencies Declared by the Governor

The Governor may issue an executive order declaring a state of emergency for the state or any portion of the state if the Governor determines that an emergency resulting from a disaster or the imminent threat of a disaster exists. Wis. Stat. § 323.10. When an emergency is declared by the Governor, a county within the emergency area may employ personnel, facilities, and other resources consistent with the county’s emergency management plan¹ to manage the problems that resulted in the declared state of emergency. Wis. Stat. § 323.14(3)(b). Additionally, even in the absence of a declared state of emergency, nothing prohibits a county from employing its personnel, facilities, and resources consistent with its emergency management plan to manage the problems associated with local disasters (subject to any restrictions imposed by federal regulations on property donated by the federal government). *Id.*

Moreover, the Governor may also specifically declare a “public health emergency.”² Wis. Stat. § 323.10. In that case, the Governor

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may designate the Department of Health Services (DHS) as the lead state agency to respond to that emergency. *Id.* As the lead state agency, DHS has additional emergency powers available and duties to administer.³

Section 250.042 also authorizes DHS to take certain actions during a public health emergency, including designating a local public health department as an agent of DHS. As DHS’s agent, a local public health department maintains the powers and duties of DHS in its role as the public health authority. This includes the authority to: (a) purchase,

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store, or distribute antitoxins, serums, vaccines, immunizing agents, antibiotics, and other pharmaceutical agents or medical supplies that DHS determines are advisable to control a public health emergency; and (b) order any individual to receive a vaccination unless the vaccination is reasonably likely to lead to serious harm to the individual or unless the individual, for reasons of religion or conscious, refuses to obtain the vaccination.

Furthermore, a county's head of emergency management⁴ is granted certain powers and duties during a declared state of emergency. During a state of emergency declared by the Governor, the head of emergency management is granted special purchasing authority. Wis. Stat. § 323.15(4). This means that the head of emergency management may contract with any person on behalf of the county or local government to provide equipment and services on a cost basis to be used to respond to a disaster, or the imminent threat of disaster. Wis. Stat. § 323.15(4).

Emergencies Declared by the County or Other Local Government

The governing body of a local government is also authorized to declare a state of emergency within the jurisdiction whenever conditions arise by reason of a riot or civil commotion, a disaster, or an imminent threat of a disaster, that impairs transportation, food or fuel supplies, medical care, fire, health or police protection, or other critical systems of the local unit of government. Wis. Stat. § 323.11. The declaration must be made by ordinance or resolution, and the period of the emergency must be limited by the ordinance or resolution to the time during which the emergency conditions exist or are likely to exist. *Id.*

Importantly, the term "disaster" is broadly defined and may be applied to a wide array of scenarios. Specifically, a "disaster" includes any event that is "a severe or prolonged, natural or human-caused, occurrence that threatens or negatively impacts life, health, property, infrastructure, the environment, the security of this state or a portion of this state, or critical systems, including computer, telecommunications, or agricultural systems." Wis. Stat. § 323.02(6).

Under a county declared state of emergency, the county board is vested with broad authority "to order, by ordinance or resolution, whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the [county] in the

emergency and includes the power to bar, restrict, or remove all unnecessary traffic, both vehicular and pedestrian, from the highways, notwithstanding any provision of chs. 341 to 349." Wis. Stat. § 323.14(4)(a).

If the county board is unable to timely meet due to the emergency conditions, the county's chief executive or administrative officer (*i.e.*, the county executive or county administrator) is authorized, by proclamation, to exercise all of the powers conferred upon the county board that "appear necessary and expedient." Wis. Stat. § 323.14(4)(b). Such a proclamation is subject to ratification, alteration, modification, or repeal by the county board as soon as it can meet. *Id.* However, any subsequent action taken by the county board does not affect the prior validity of the proclamation. *Id.*

During an emergency declared by the county, the county's head of emergency management is charged with implementing his or her duties prescribed by the county board under the county's emergency management plan. Wis. Stat. § 323.15(1)(a).

As a general rule, as the various cases have shown, the more an emergency response impacts constitutional liberties, the greater the opportunity for legal challenge.

Practical & Legal Considerations

The COVID-19 pandemic triggered a significant response from our federal and state governments. We are all aware of the legal challenges resulting from the exercise of various emergency powers. As a general rule, as the various cases have shown, the more an emergency response impacts constitutional liberties, the greater the opportunity for legal challenge. While a discussion surrounding constitutional and statutory principles impacting emergency powers extends beyond the scope of this article, it is important for counties to consult with corporation counsel early and often when it comes to the content, scope, and duration of proclamations, orders, ordinances.

The goal of any emergency response is obviously to mitigate, as much as possible, the condition causing the emergency. Therefore, it is important for counties and local governments to share information with the public as to the emergency response in an effort to obtain full “buy in” to the response.

Conclusion

Every emergency situation is different and presents its own unique challenges. However, counties should familiarize themselves with the Wis. Stat. Chap. 323 concepts and processes discussed above, and should also make sure to review and update their emergency management plans on a frequent basis to ensure they are as prepared as possible for when an emergency situation inevitably arises. If you have any questions about emergency management, declarations of emergency, or any other governmental law needs, please contact the Wisconsin Counties Association or any member of the von Briesen & Roper Government Law Group (www.vonbriesen.com). ♦

Endnotes

- 1 Each county board must develop and adopt an emergency management plan and program and designate a committee of the board as the “county emergency management committee. The plan must also be compatible with the state’s emergency management plan, including incorporating the use of the “incident command system” developed by the Wisconsin Department of Administration and administered by the adjutant general. The “incident command system” is “a functional management system established to control, direct, and manage the roles, responsibilities, and operations of all of the agencies involved in a multi-jurisdictional or multi-agency emergency response.” Wis. Stat. §§ 323.14(1) and 323.02(9).
- 2 “Public health emergency” means the occurrence or imminent threat of an illness or health condition that meets all of the following criteria:
 - (a) Is believed to be caused by bioterrorism or a novel or previously controlled or eradicated biological agent.
 - (b) Poses a high probability of any of the following:
 1. A large number of deaths or serious or long-term disabilities among humans.
 2. A high probability of widespread exposure to a biological, chemical, or radiological agent that creates a significant risk of substantial future harm to a large number of people.
- 3 See e.g., Wis. Stat. Chapters 250 and 252.
- 4 Each county must also designate a “head of emergency management.” In counties with a county executive, the county executive (or the executive’s designee) is required to serve as the head of emergency management. Wis. Stat. §§ 323.14(1)(a)1. and 2.