

**TO:** Interested Parties

**FROM:** Andy Phillips, Attolles Law, s.c.

**RE:** SUPPLEMENT TO GUIDANCE: SCOPE OF LOCAL HEALTH  
DEPARTMENT AND BOARD AND LOCAL HEALTH OFFICER  
JURISDICTION

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Shortly following the Wisconsin Supreme Court’s decision in *Wisconsin Legislature v. Palm*, 2020 WI 42, the Wisconsin Counties Association created a task force to address questions surrounding the implementation and enforcement of local health orders under Wis. Stat. Ch. 252. In August of 2020, the task force completed its work and the Association released the publication *Guidance in Implementing Regulations Surrounding Communicable Diseases – An Analysis of Local Health Department and Local Health Officer Powers, Duties, and Enforcement Actions*. The *Guidance* may be found [HERE](#). On October 14, 2020, the Association released a supplement to the *Guidance*, which provided analysis and options for enforcement of Local Health Officer (“LHO”) orders utilizing the process set forth in Wis. Admin. Code § DHS 145.06.

Since 2020, several organizations have undertaken further review to analyze statutory and regulatory authority of LHOs and Local Health Departments and Boards (“LHD”) in order to best prepare for future efforts to combat the spread of communicable diseases. In the context of such further work, questions have arisen concerning the jurisdictional scope of LHOs and LHDs. The purpose of this supplement to the *Guidance* is to address these jurisdictional questions and to identify the extent that county health ordinances and LHO orders are applicable within a county. As described in detail below, county health ordinances and LHO orders apply not only within all unincorporated areas of the county, but also within municipalities that have not established their own LHD.

The questions regarding the scope of LHO jurisdiction arise out of the fact that county ordinances do not typically apply to incorporated areas of the county (*i.e.*, municipalities). The reason for this is twofold: (1) municipalities generally have home rule authority to determine their local affairs and government;<sup>1</sup> and (2) “[t]he powers of the county boards of supervisors are limited to those which are conferred by the legislature,”<sup>2</sup> either by express language or “by clear implication.”<sup>3</sup> Despite this general framework, there are certain instances in which county ordinances and regulations are applicable within the entire territory of the county (*i.e.*, both unincorporated areas and incorporated areas).

Generally, when determining whether a county ordinance is also applicable in municipalities depends “upon the reasons for the county ordinance, the provisions therein, the statutory authority under which it is sought to be exercised and whether [municipalities] have adopted ordinances or codes involving the same subject.” 72 Op. Att’y Gen. 153 (1983). Here, the analysis is

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<sup>1</sup> See Wisconsin Constitution Article XI, Section 3 and Wis. Stat. § 66.0101.

<sup>2</sup> *State ex rel. Teunas v. Kenosha Cty.*, 142 Wis.2d 498, 503 (Wis. 1988).

<sup>3</sup> *Maier v. Racine Cty.*, 1 Wis.2d 384, 385 (Wis. 1957).

straightforward as the relevant statutes expressly provide that county health ordinances and LHO orders will also apply in municipalities that have not established their own LHD.

Pursuant to Wis. Stat. § 251.02(1), a county must establish an LHD<sup>4</sup> which “shall serve all areas of the county that are not served by” another LHD. Every LHD will be governed by a board of health and will have an LHO “who is in charge of [the] local health department.” Wis. Stat. §§ 251.04(1) and 250.01(5). Importantly, “[t]he jurisdiction of the local health department shall extend to the entire area represented by the governing body of the county . . . that established the local health department, except that the jurisdiction of a single or multiple county health department or of a city-county health department does not extend to cities, villages and towns that have local health departments” of their own. Wis. Stat. § 251.08.<sup>5</sup> For example, in a county where no municipalities have established their own LHD, the jurisdiction of the county’s LHD and LHO covers the entire county. Alternatively, if one city within a county has established its own LHD, the jurisdiction of the county’s LHD and LHO covers the entire county *except* for such city.

Regarding communicable diseases specifically, Wis. Stat. § 252.03(1) empowers an LHO to take certain actions in their “territory” or “jurisdiction” and “report to the appropriate governing body.” LHOs are also tasked with investigating certain conditions “within the jurisdictional area of the local health department.” Wis. Stat. § 251.06(3)(f). The LHO’s “jurisdiction” in this context is as set forth in Wis. Stat. § 251.08 and discussed in the immediately preceding paragraph.

Additionally, along with being charged with enforcing “state public health statutes and rules,” a county LHO shall “[e]nforce any regulations that the local board of health adopts and any ordinances that the relevant governing body enacts.” Wis. Stats. §§ 251.06(3)(b) and (c)(emphasis added).<sup>6</sup> Pursuant to Wis. Stat. §§ 252.03, 252.25, and 66.0113(1)(a), a county has authority to enact ordinances with respect to public health, including communicable disease measures, so long as such ordinances are not preempted by state law. *See Becker v. Dane Cty.*, 2022 WI 63, 403 Wis.2d 424 (Wis. 2022). Because a county LHD has jurisdiction over municipalities within its borders without their own LHD (Wis. Stat. § 251.08) and LHOs are required to administer “any ordinances that the relevant governing body enacts” (Wis. Stat. § 251.06(3)(c)), a county communicable disease ordinance will apply not only to the unincorporated portions of a county, but likewise in municipalities that have not created their own LHD. Indeed, when a municipality has not established its own LHD, the only “relevant governing body” that could enact a communicable disease ordinance, which by its very nature empowers an LHO to enforce orders, would be the county in which the municipality is located.

If you have any questions or concerns with this Supplement, please do not hesitate to contact the Association.

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<sup>4</sup> This requirement does not apply to (a) Milwaukee County; (b) a county that elects to establish a city-county health department; or (c) a county that is part of a multi-county health department. *Id.* Nonetheless, if a county has a city-county health department or a multiple county health department the same is true – such health departments “shall serve all areas of the county [or respective counties] that are not served by” another local health department. Wis. Stats. §§ 251.02(1m) and (3).

<sup>5</sup> However, a city, town, or village with an LHD may still elect to come under the jurisdiction of a county LHD if its local board of health votes to do so. Wis. Stat. § 251.08.

<sup>6</sup> As used in Wis. Stat. ch. 251, the term “relevant governing body” means the body or bodies that established the LHD.