

TO: Interested Parties

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

RE: SUPPLEMENT TO GUIDANCE IN IMPLEMENTING REGULATIONS
SURROUNDING COMMUNICABLE DISEASES

DATE: August 1, 2023

In August of 2020, the Wisconsin Counties 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](#). The purpose of this supplement to the *Guidance* is to address updates in the law since the *Becker v. Dane Cty.*, 2022 WI 63, 403 Wis.2d 424 (Wis. 2022) decision as we now have clearer guidance regarding local health officer (“LHO”) authority.

The *Guidance* outlined the unsettled parameters of LHO authority with respect to preventing the transmission of communicable diseases following the *Wisconsin Legis. v. Palm*, 2020 WI 42, 391 Wis.2d 497 (Wis. 2020) decision. While the *Palm* Court addressed only the Wisconsin Department of Health Services (“DHS”) Secretary’s authority to regulate the spread of communicable disease under Wis. Stat. § 252.02, its holding left unanswered whether the same reasoning would apply to LHOs and restrict their authority under Wis. Stat. § 252.03.

The *Palm* Court explained that the delegation of powers upon an unelected official, DHS Secretary Palm, raised serious constitutional concerns related to the separation of powers. *Palm*, 2020 WI at ¶ 67. The *Guidance* explained that because DHS Secretary and LHO statutory authority is similar, another court may, if provided the opportunity, express similar concerns regarding LHO authority to stop the spread of communicable disease. However, the *Becker* Court addressed this exact point and held that the delegation of authority to LHOs pursuant to Wis. Stat. § 252.03 and the corresponding county ordinance at issue was constitutional. *Becker*, 2022 WI at ¶ 45.

As such, while the *Guidance* explained that “it may be prudent to have local health officer orders impacting the public at large and implementing mandatory measures (*i.e.*, subjecting a person to a penalty for noncompliance) be subject to review by the county board,” we now have guidance from the Wisconsin Supreme Court in *Becker* that provides otherwise. Put simply, the *Becker* Court held that Wis. Stat. § 252.03 authorizes LHOs to issue public health orders and confirmed that there are no separation of powers concerns so long as such orders comply with the statutory requirement to be “necessary to prevent, suppress and control communicable diseases” or “reasonable and necessary for the prevention and suppression of disease.” *Becker*, 2022 WI at ¶¶ 22 and 45; Wis. Stat. § 252.03.

It should be noted, however, that enforcement of an LHO order must still be rooted in authority provided to the LHO by Wis. Stat. § 252.25 and county ordinance. In *Becker*, the Dane County LHO’s enforcement authority for violation of the public health order at issue derived from Dane County Ordinance § 46.40(2), which makes it “a violation of [Dane County Ordinance ch. 46] to refuse to obey an Order of the Director of Public Health Madison and Dane County entered to

prevent, suppress or control communicable disease pursuant to Wis. Stat. s. 252.03.” A violation could result in a civil forfeiture of between \$50 and \$200 “for each day that a violation exists.” Dane County Ordinance § 46.27(1). Importantly, the *Becker* Court concluded that the Dane County Ordinance was not preempted by state law and did not exceed the County’s statutory authority to authorize the issuance of civil citations for violations of ordinances. *Becker*, 2022 WI at ¶¶ 25-28. In light of the *Becker* Court’s underlying analysis, counties should also ensure that any enforcement ordinance makes it clear that a violation of a public health order is a violation of the underlying ordinance (in order to make sure the ordinance remains within the scope of authority granted to counties under Wis. Stat. § 66.0113(1)(a)).

In addition, it is important to recognize the Legislature’s recent restriction on the duration of any LHO order relating to the closure of businesses within the LHO’s jurisdiction as contained in 2023 Wisconsin Act 12 and codified at Wis. Stat. § 252.03(2j). The new statutory provision provides:

(2j) A local health officer may not issue a mandate to close any business in order to control an outbreak or epidemic of communicable disease for longer than 30 days unless the governing body of the political subdivision in which the order is intended to apply approves one extension of the order, not to exceed 30 days. A mandate to close more than one business as provided under this subsection may not distinguish between essential and nonessential businesses. In this subsection, “political subdivision” means a city, village, town, or county.

Essentially, an LHO order to close businesses to control the spread of a communicable disease may not (a) discriminate among classes of businesses based upon a determination of whether a particular business is “essential;” and (b) extend longer than 30 days. Such an order may be extended for an additional 30 days only upon action by the county board providing for such an extension.

For additional information regarding the enforcement of public health orders, please refer to the section of the *Guidance* captioned “ENFORCEMENT OF LOCAL HEALTH OFFICER ORDERS.”

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