COVID Restrictions Struck in Wisconsin – Other Challenges Likely

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Tensions between safety, public health, and economic considerations broke into open view again yesterday, as the Wisconsin Supreme Court struck down an Emergency Order issued by the Secretary of the Wisconsin Department of Health Services (DHS) to regulate social activity and prevent the spread of the COVID-19 virus.

While the grounds for the 4-3 decision are narrow, and its precedential value may be limited outside Wisconsin, the decision may embolden advocates of an aggressive return-to-work approach, and may lead to other broader legal and constitutional challenges in other states.

The Wisconsin Emergency Order was typical of stay-at-home orders issued across the country last month, as concerns mounted over the widening spread of COVID-19. It was spurred by the Wisconsin Governor's March 12, 2020 declaration of a "state of health emergency," which directed the DHS to "take all necessary and appropriate measures to prevent and respond to incidents of COVID-19 in the State." Following that directive, on March 24, 2020, the Wisconsin DHS Secretary ordered "all individuals present within the State of Wisconsin ... to stay at home or at their place of residence."

On April 16, 2020, the Secretary followed up with the order in question, known as Emergency Order 28: closing "non-essential" businesses, prohibiting private gatherings except within a single household, and forbidding "non-essential" travel through May 26, 2020. Violations of the Emergency Order were subject to imprisonment for up to 30 days, a $250 fine, or both. As authority for the issuance of this Emergency Order, the Secretary cited "the Laws of the State [of Wisconsin], including but not limited to [Wis. Stat. §] 252.02(3), (4), and (6)" – a series of statutory provisions which empowered DHS to take action to quarantine infected individuals and control the spread of communicable diseases.

The Wisconsin legislature sued, arguing (1) that Emergency Order 28 was a rule that had been promulgated without notice, hearing, or publication, in violation of the Wisconsin Administrative Procedure Act, Wisconsin Statute § 227 et seq.; and, alternatively, (2) that the scope of Order 28's stay-at-home provisions – shutting down all "nonessential" businesses and travel – exceeded the scope of the administrative authority provided by Wisconsin Statute § 252. The Wisconsin Supreme Court, exercising original jurisdiction, agreed that the Order met the statutory definition of an administrative "rule." In so doing, the Court relied heavily on prior Wisconsin precedent, including *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis.2d 804 (1979) and *Cholvin v. DHFS*, 313 Wis.2d 749 (2008), which construed the term "rule" by reference to the types and numbers of people affected. Essentially, under these precedents, an administrative order is considered a "rule," and is subject to administrative rulemaking procedures, when it affects a class of people that is "described in general terms," and in a way that "new members can be added to the class. "

The Secretary argued unsuccessfully that Emergency Order 28 was not a "rule," and did not need to comply with administrative rulemaking procedures, because it responded to a specific, urgent situation that was limited in time. The Wisconsin court rejected that argument. Among other things, the Court noted the existence of a separate emergency rulemaking provision, Wisconsin Statute § 227.24(1)(a), that allowed an agency to "promulgate a rule as an emergency rule without complying with the notice, hearing and publication requirements [of the statute], if preservation of the public peace, health, safety, or welfare necessitate[d]" urgent action. But "emergency rules" issued under this provision only remain in effect for a maximum of 150 days, and are subject to oversight by the

Wisconsin legislature, and the Secretary – perhaps cognizant of this limitation – had chosen not to follow this emergency procedure in issuing Order 28.

The court might have ended its analysis there – finding Order 28 contravened the rulemaking procedures of the Wisconsin Administrative Procedures Act – in which case the Secretary could simply have moved to re-issue the Order for a time-limited period using her emergency authority. However, the court chose to go further: examining the scope of Wisconsin Statute § 252, which the Secretary had cited as legal authority for her administrative action.

In promulgating the Order, for example, the Secretary had cited Wisconsin Statute § 252.02(6) which provides that "the department may authorize and implement all emergency measures necessary to control communicable diseases." The Wisconsin court found this delegation of authority unconstitutionally vague, on grounds that it empowered the criminalization of private conduct, but did not "give a person of ordinary intelligence ... fair notice of conduct required or prohibited."

Likewise, in promulgating the Order, the Secretary cited Wisconsin Statute § 252.02(6), which provided administrative authority for "guarding against the introduction of any communicable disease into the state, for the control and suppression of communicable diseases, 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." The court found Emergency Order 28 went beyond these limits. It found the Order exceeded the Secretary's quarantine authority, for example, "[because the order] quarantine[d] '[a]ll individuals present within the State of Wisconsin,'" regardless of whether they were (or were suspected of being) infected.

As grounds for these rulings, the Wisconsin court relied on the state's doctrine of "explicit authority," a "legislatively imposed canon of construction that requires [courts] to narrowly construe imprecise delegations of power to administrative agencies." See Wis. Stat. § 227.10(2m) ("No agency may implement or enforce any standard, requirement, or threshold, . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter[.]"). The statutory doctrine is unique to Wisconsin; it is a part of the controversial reform legislation enacted by then-Governor Walker in 2011 to restrict administrative authority, as part of a "deliberate decision to shift policy-making decisions away from state agencies and [back] to the Legislature." Koschnick, *Making 'Explicit Authority' Explicit: Deciphering Wis. Act 21's Prescriptions for Agency Rulemaking Authority*, 2019 Wis. L. Rev. 993 (2019).

In the end, the precedential scope of the Wisconsin decision may be limited, particularly in states whose public officials – unlike Wisconsin's – have relied on defined emergency powers or followed established rulemaking procedures. The broader elements of the Wisconsin decision – finding the Secretary exceeded the grant of her administrative authority to "control communicable diseases" – may find little traction in other states, with different legislative schemes, where the doctrine of "explicit authority" has not been statutorily recognized.

However, the larger significance of the Wisconsin decision may be symbolic: emboldening broad legal attacks on the constitutional and legislative basis for stay-at-home orders, and opening new legal fronts as tension grows over COVID-19 limitations.

If you have questions or would like more information, please contact Eric B. Hermanson (hermansone@whiteandwilliams.com; 617.748.5226), Austin Moody (moodya@whiteandwiliams.com; 617.748.5206) or another member of the Insurance Coverage and Bad Faith Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of

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