

How Does the Wisconsin Supreme Court Mask Mandate Decision Affect My Business

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Practice Area: Business and Corporate Law & Labor and Employment

In a 4-3 Decision written by Justice Brian Hagedorn, the Wisconsin Supreme Court struck down Governor Tony Evers' mask mandate intended as a use of the emergency powers of a governor under Wisconsin Statutes Chapter 323 to combat the emergent threat of the Coronavirus.

The Court held that Governor Evers violated state law by unilaterally issuing multiple emergency orders to extend the emergency declarations and mask mandate beyond an initial 60 day period. The Court found that the statute contemplates an end to such orders (60 days after the declaration) and that the decision to extend such orders resides with the Legislature, even when the underlying occurrence creating the emergency remains a threat. The Court noted that pursuant to the straightforward statutory language, the Governor may not deploy his emergency powers by declaring new states of emergency for the same statutory occurrence.

For background, after declaring a state of emergency related to COVID-19 in March of 2020, Governor Evers issued executive orders declaring additional states of emergency in July of 2020 and again in September of 2020. Subsequent emergencies were declared as a prior declaration was set to expire. The Court held that each declaration following the first 60 day declaration was unlawful as the declarations were not extended by the Legislature.

As the Court noted, the decision does not determine whether the Governor acted wisely, whether a mask mandate is appropriate, or any other policy determinations regarding the combating of COVID-19. The Court's role was to determine whether the law gives the Governor the authority to successively declare states of emergency in the current circumstance.

Under Wis. Stat. §323.10, two distinct emergencies can occur that provide the Governor with certain extraordinary powers – a “disaster” or a “public health emergency”. Each of the two situations have different statutory conditions, but in either situation the Governor's state of emergency “shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the Legislature.” In this situation, the Governor was exercising his authority under the provisions dealing with a “public health emergency”.

The “public health emergency” aspect of the statute has two primary conditions. First, there is an enabling condition that the situation must meet the statutory definition of a “public health emergency”. Meeting this definition was not at issue in this case.

The second condition associated with the Governor's exercise of power involves the duration of the declaration. While the statute allows for the revocation of a "public health emergency" at the discretion of either the Governor or the Legislature, the state of emergency shall not exceed 60 days, unless extended by joint resolution of the Legislature.

The Governor argued that successive states of emergency may be declared if the public health emergency continues beyond the 60 day period. The challengers of the mask mandate argued the Governor's authority is limited to 60 days unless further agreement is made with the Legislature.

As the Court interpreted the statute, it found that the Legislature intended to provide the Governor with the authority to act for up to 60 days in such an emergency. After that, the Governor would have to work with the Legislature to further address the emergency.

In reality, the case addresses the issue of separation of powers between the Governor and the Legislature. As the Court noted, the case does not involve whether mask mandates are appropriate. The Court simply held that to the extent such statewide mandates exceed 60 days, such extensions must be made by both the Governor and the Legislature.

What does this decision mean for employers? Even though the statewide mask mandate is no longer in place, there are a number of reasons employers should consider the continuation of requiring masks in the workplace for employees and visitors. First, some local municipalities have passed their own mask ordinances which are not impacted by the Court's decision. Employers in these jurisdictions may still have an obligation to require masks. Second, employers that fail to provide a safe environment for employees and invitees risk potential liability under Wisconsin's Safe Place statute and OSHA's general duty clause. Maintaining a workplace mask policy may assist satisfying the obligation for providing a safe workplace. These requirements exist even with the state's adding some liability protection against COVID-19 litigation cases. We recognize that decisions will be made on a workplace to workplace basis depending upon your specific considerations and culture.

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