Local Safer at Home Orders— Can They do That?— Legally?

Article
May 15, 2020

On May 13, 2020 the Wisconsin Supreme Court in a split decision, struck down the Executive Order 28 Safer at Home (SAH). The same day the decision was announced counties and some municipalities started enacting their own health orders. In several cases the orders simply stated that the SAH and a couple other executive orders would be applicable to all individuals within their jurisdiction. So it appears the local governments can do what the state department of health cannot? That doesn't seem right. Well that depends.

First it is important to understand that the SAH was not the Governor's order; it was an order of the Director of the Wisconsin Department of Health Services, the director of a state administrative agency, issued under the authority § 252.02 of the Wisconsin Statutes, a provision of the chapter of the statues addressing communicable diseases.

Without delving into the 166 pages of majority, concurring and dissenting opinions, the majority of the Supreme Court determined to strike down the SAH for 2 reasons:

1. The SAH is a "rule" within the statute that applies to the authority of state agencies; further that such rules can only be promulgated under the rule making procedures provided by state statute (which the Director did not follow); further that because those procedures were not followed no criminal penalty for violation of the SAH could be enforced
2. The SAH went far beyond what controls are authorized by 252.02 of the Wisconsin statutes. The Supreme Court read the language of 252.02 as limiting the scope of the department's authority, giving the prohibition on anything but essential travel, closing of non-essential services and provision requiring all individuals to remain in the home unless otherwise permitted by the order as examples of issues that went beyond what the statute expressly permitted; further the Court found that the SAH as drafted is not specific enough to provide sufficient notice of the prohibited conduct for criminal prosecution purposes.

As the abovementioned suggests the thrust of the decision was the nature of the administrative authority of the department of health the scope of the statute governing the authority given to that agency. Local governments are not administrative agencies. Nor do they derive their communicable disease

regulatory authority from § 252.02 Wis. Stats. Instead they are either subdivisions of the state (counties) or municipalities (limited to cites with their own health department in this case) who derive their communicable disease authority from § 252.03 Wis Stats.

252.03 (2) Wis. Stats. the provision that grants local health officials authority with regard to communicable disease, provides in relevant part:

(2) Local health officers may do what is reasonable and necessary for the prevention and suppression of disease; may forbid public gatherings when deemed necessary to control outbreaks or epidemics and shall advise the department of measures taken.

In contrast § 252.02 (4) and (6) Wis. Stats. grants authority to the State Department of Health in a different manner providing:

(4) Except as provided in ss. 93.07 (24) (e) and 97.59, the department may promulgate and enforce rules or issue orders 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. Any rule or order may be made applicable to the whole or any specified part of the state, or to any vessel or other conveyance. The department may issue orders for any city, village or county by service upon the local health officer. Rules that are promulgated and orders that are issued under this subsection supersede conflicting or less stringent local regulations, orders or ordinances.

(6) The department may authorize and implement all emergency measures necessary to control communicable diseases.

The most notable difference in the grants of power is the lack of any reference to rule promulgation procedures in the local provision. Again, the requirement of promulgating rules (including the emergency rules of (6)) was the principal basis the court used for striking down the SAH.

Another notable difference is that the local health authority is not limited to "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" all of which were used by the court to explain how the Director exceeded the statutory grant of authority. These limitations may not be applicable to local regulatory action.

In contrast the statute grants the Local Health Officials the authority to do what is reasonable and necessary for the prevention and suppression of disease without any qualification of rule promulgation or limiting list of authority. That forms a pretty good statutory basis for the local health authority to adopt rules that are consistent with medically recognized best practices to prevent the spread of a highly contagious and potentially lethal disease. On top of that, Wisconsin has recognized that local governments have home rule authority to enact police regulations that are deemed in the interest of their communities and are not contrary to or preempted by state or federal law. In this case there is no federal guidance, and what state law there was has been removed by the Supreme Court.

All that being said, in cases where the local health officials simply adopted the SAH, they likely have adopted the enforceability issues noted by the Supreme Court. While the local health authority may have the authority to implement broad rules so long as they are reasonably necessary for the suppression of disease, the rules they are using still have to be specific enough to give fair notice of the prohibited conduct if they are to be enforced by criminal prosecution. Remember the Supreme Court has already said the SAH does not give enough notice to form the basis for a criminal charge. So how is it to be enforced? At least one DA from a larger county has said he would not be able to enforce a local order that simply mimics the SAH.

So where does that leave us? Is it wise to ignore what orders may be out there? I refer business owners to , but I also caution that not all jurisdictions are on the hook. The City of Milwaukee order is likely valid and enforceable in that they drafted their own order with more specificity than the SAH.

Also as outlined above, there is authority for a local authority to draft enforceable SAH like regulations. Regulations that are based on more objective criteria and address the specificity and limitations set by the Supreme Court would likely be enforceable. Using forfeiture and civil enforcement mechanisms instead of criminal enforcement would help to avoid the Supreme Court's notice concerns.

Several counties who rapidly put local SAH mimicking the SAH in place have just as rapidly pulled their local orders. The Attorney General has announced he is releasing an opinion addressing questions on the scope of appropriate legislation and the Department of Health intends to a template of rules recommended for local adoption. It is reasonable to assume many local health officers will create a new set of local rules in the very near future.

Also local governments might not be completely foreclosed from municipal home rule or emergency powers action. With regard to municipalities in areas where the local health officers will not issue 252.03 rules or issue rules that do little to impose disease prevention regulations, there may be another option available to municipalities that want to apply SAH like emergency regulations.

§ 323.11 Wis. Stats. allows municipalities to declare local emergencies. § 323.14 Wis. Sets set forth a local government's emergency powers during an emergency which powers include: "whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government in the emergency and includes the power to bar, restrict, or remove all unnecessary traffic, both vehicular and pedestrian, from the highways…" Rules based on this law would be enacted by the legislative body of the municipality and consequently if properly done, an exercise of police power under home rule authority. At this time there is no law on the extent of this emergency authority, and it is unclear whether a court would find the scope of authority under § 323.14 issuing health orders.

Many municipalities and the State Department of Health are concerned with the potential of rapid spread of the disease if there is no enforceable regulation of group gatherings or social distancing in place. The state legislature and Supreme Court left the issue to the local governments. It is likely many local governments will pick up the mantle and with the assistance of state administration continue to make efforts to provide a coordinated active response to the COVID-19 pandemic in many areas of the state.