

CONFIDENTIAL LEGAL MEMORANDUM



To: Our Municipal Clients and Friends
From: Attys Ashley Lehocky, Richard Carlson & Adam Marshall
Date: March 18, 2020
Re: Common Questions Concerning COVID-19

Coronavirus has shut down much of the State of Wisconsin, however, municipalities have an obligation to ensure that they are complying with open meetings laws. We have received many questions from our clients, large and small, regarding what they can and should be doing to ensure the safety of residents within their municipal buildings.

In an effort to ensure that we have the most up-to-date information as questions arise, we are closely monitoring the situation and keeping in contact with our colleagues. Below is a list of our firm's recommendations in response to some of the frequent questions we have received from our clients. As new information becomes available, we will do our best to keep you informed of the same.

EMERGENCY DECLARATIONS

Emergencies may be declared by local governments when conditions arise "by reason of a riot or civil commotion, a disaster, or an imminent threat of a disaster, that impairs transportation, food or fuel supplies, medical care, fire, health or police protection or other critical [municipal] systems." Wis. Stat. § 323.11. This must be done by ordinance or resolution. The ordinance or resolution must limit the emergency period to the time during which the emergency conditions exist or are likely to exist.

Wis. Stat. § 323.14 sets forth the duties and powers of local units of government during an emergency. Emergency powers confer "the general authority to order, by ordinance or resolution, 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 . . ." Wis. Stat. § 323.14(4)(a).

If, because of the emergency conditions, the applicable governing body "is unable to meet promptly, the chief executive officer . . . of any local government shall exercise by proclamation . . . [the emergency powers] that appear necessary and expedient. The proclamation shall be subject to ratification, alteration, modification, or repeal by the governing body as soon as that body can meet, but the subsequent action taken by the governing body shall not affect the prior validity of the proclamation." Wis. Stat. § 323.14(4)(b).

In short, because many town, village and city halls will be closing, postponing meetings and altering the way in which the public has access to government officials and staff, it is our firm's recommendation that our clients strongly consider enacting an emergency declaration now. Doing so will give community leaders the flexibility to put further restrictions in place, as well as to enforce mandatory closings of public spaces. Further, we believe that an emergency declaration may have the positive effect of shielding government officials from liability for unintended violations of open records laws in that it would provide context should a subsequent court action arise.

A proposed resolution is attached to this memorandum for your convenience and consideration.

ENFORCEMENT OF MANDATORY CLOSINGS OF BARS AND RESTAURANTS

The mandatory closings of bars and restaurants will, presumably, be enforced at a county level. For those who have their own police services and/or contract with their local sheriff's department for enhanced services, law enforcement personnel should be directed that when responding to violations of the mass gathering prohibitions, the primary goal should be to educate and achieve voluntary compliance. Citations should be issued only if there is a refusal to comply.

Towns who do not have enhanced police services may, if an emergency declaration is made, issue citations through their town clerks. Should that need arise, please contact our office, and we will do our best to assist in that process.

PUBLIC HEARINGS AND REGULARLY SCHEDULED MEETINGS

Public open meetings and hearings may take place as planned so long as the public has access and the ability to participate.

Local government facilities are, at this time, exempt from the mass gathering prohibition. Despite that fact, frequent and/or large gatherings for public meetings should be avoided when possible. Meetings should be limited to vital town or village business only.

The Department of Justice has issued an advisory opinion regarding open meetings and COVID-19. That opinion states, in part:

. . . governmental bodies typically can meet their open meetings obligations, while practicing social distancing to help protect public health, by conducting meetings via telephone conference calls if the public is provided with an effective way to monitor such calls (such as public distribution, at least 24 hours in advance, of dial-in information for a conference call).

The open meetings law states: "[I]t is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1). To that end, the law requires

that “all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.” Wis. Stat. § 19.81(2). A meeting must be preceded by notice providing the time, date, place, and subject matter of the meeting, generally, at least 24 hours before it begins. Wis. Stat. § 19.84.

The open meetings law “does not require that all meetings be held in publicly owned places but rather in places ‘reasonably accessible to members of the public.’” 69 Op. Att’y Gen. 143, 144 (1980) (quoting 47 Op. Att’y Gen. 126 (1978)). As such, DOJ’s longstanding advice is that a telephone conference call can be an acceptable method of convening a meeting of a governmental body. Id. at 146. More recently, DOJ guidance deemed video conference calls acceptable as well. Wis. Dep’t of Justice, Wisconsin Open Meetings Law Compliance Guide 11 (May 2019), <https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/OML-GUIDE.pdf>.

When an open meeting is held by teleconference or video conference, the public must have a means of monitoring the meeting. DOJ concludes that, under the present circumstances, a governmental body will typically be able to meet this obligation by providing the public with information (in accordance with notice requirements) for joining the meeting remotely, even if there is no central location at which the public can convene for the meeting. A governmental body conducting a meeting remotely should be mindful of the possibility that it may be particularly burdensome or even infeasible for one or more individuals who would like to observe a meeting to do so remotely—for example, for people without telephone or internet access or who are deaf or hard of hearing—and appropriate accommodations should be made to facilitate reasonable access to the meeting for such individuals.

Public access and the ability for the public to comment are essential requirements for open meetings. Ultimately, whether a meeting is “reasonably accessible” is a factual question that must be determined on a case-by-case basis.

We strongly encourage all efforts to receive public comment be pursued and made a part of the record. One way to ensure this is accomplished is to request public comment in writing prior to and/or by allowing interested persons to call in during the meetings if possible. Recordings of those meetings and/or transcripts of the same should be promptly posted.

Requests for accommodations (e.g. for those hard of hearing, deaf or unable to access meetings electronically) should be documented at the time they are made and considered on a case-by-case basis.

TOWNS' ANNUAL MEETINGS

It is likely that our towns' annual meetings will be impacted by COVID-19. The annual town meeting may be adjourned up to 30 days from its previously scheduled date. Wis. Stat. § 60.11. If the town chairperson is absent, another town board supervisor chairs the town meeting. If no town board member is present, the town meeting elects a "qualified voter" (a U.S. citizen age 18 or over who has resided in the town for at least 28 consecutive days prior to the meeting) as chairperson. Wis. Stat. § 60.13.

For now, if possible, we are recommending that our towns consider postponing their annual meeting 30 days from the previously scheduled date. We are hopeful that there will be more guidance from the DOJ if the mass gathering restrictions remain in effect into the month of April.

SPRING ELECTIONS

The League of Wisconsin Municipalities is working with the State to determine whether the spring election will proceed as scheduled on April 7, 2020. In the meantime, we recognize that many of our clients are making efforts to encourage absentee registration and voting. Some municipalities intend to train their staff as poll workers to reduce exposure to higher-risk individuals.

We are confident that clear direction on whether the election will proceed and, if so, in what fashion, will be given by the WEC shortly. We will work to keep you updated.

TRAINING AND COMMUNITY EVENTS

All non-essential training should, at this time, be limited or cancelled for employees and volunteers. Particularly, law enforcement and first responders should limit or eliminate group training activities. Questions regarding training that is required for accredited activities/licensing should be directed to the licensing agencies.

Many of our municipal clients have public spaces that they rent out for parties and events. If you have not already done so, please contact those who have reserved space to notify them that those reservations will also need to be rescheduled or cancelled.

AN IMPORTANT REMINDER FOR EMPLOYEES WORKING FROM HOME

As our clients know and are frequently reminded, e-mail correspondence is subject to open records. This fact remains true even when our vital employees are working remotely. Our computers should not become our primary means of communication for sensitive town or village business.

Please stress to your employees the importance of discussing work-related matters by phone, if they cannot do so in person.

The same goes for our elected officials. Group chats among board members may constitute a meeting under open records laws. If your board is unable to meet as a result of this virus, they must be directed to wait to discuss important town/village business.

In addition to the proposed emergency declaration resolution, we have attached to this memorandum Executive Order 2020-72 (declaring a state of emergency), DHS Emergency Order #5 (prohibiting mass gatherings) and the DOJ Advisory Opinion regarding open meetings.

These are uncharted waters, but we are all in this together. At this time, our offices remain open. We can be reached by email or by phone at (920) 725-1233 with questions, concerns or suggestions.

RESOLUTION DECLARING AN EMERGENCY
IN THE TOWN/VILLAGE OF _____,
_____ COUNTY, WISCONSIN

WHEREAS, on March 12, 2020, the State of Wisconsin, by Governor Tony Evers, proclaimed by Executive Order #72 that a public health emergency, as defined in Wis. Stat. § 323.02(16), exists for the State of Wisconsin;

WHEREAS, Governor Evers has designated the Department of Health Services as the lead agency to respond to the public health emergency and has directed the Department of Health Services to take all necessary and appropriate measures to prevent and respond to incidents of COVID-19 in the State;

WHEREAS, on March 17, 2020, the Department of Health Services Secretary Andrea Palm issued Emergency Order #5 under the authority of Wis. Stat. § 252.02(3) prohibiting “mass gatherings” which will remain in effect for the duration of the public health emergency declared in Governor Evers’ Executive Order #72, unless otherwise ordered by the Department of Health and Services;

WHEREAS, “mass gathering” is defined as any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together ten (10) or more people in a single room or single confined or enclosed space at the same time;

WHEREAS, Emergency Order #5 exempts, among others, local government facilities, including government service centers, from the prohibition of “mass gatherings”;

NOW, THEREFORE BE IT RESOLVED, the Town/Village of _____, _____ County, Wisconsin, by this resolution, adopted by a majority of the town/village board on a roll call vote with a quorum present and voting and proper notice having been given, resolves and orders as follows:

1. A public health emergency is declared as existing within the Town/Village of _____, _____ County, Wisconsin as a result of the COVID-19 disease which presents an imminent threat that may impair transportation, food or fuel supplies, medical care, or other critical systems of our local government.
2. The Town/Village of _____ will seek to enforce the prohibition of mass gatherings as dictated by the Department of Health Services and State of Wisconsin.
3. The town/village board, or the town/village administrator, shall have the authority to order whatever further measures deemed necessary and expedient for the health, safety, welfare, and good order of the Town/Village of _____ during the emergency, including without limitation the power to bar, restrict, and remove unnecessary traffic, vehicular or pedestrian, and public gatherings, from public places.

4. The period of emergency shall be limited to the time during which the emergency conditions exist or are likely to exist in the **Town/Village of _____**.

5. Any person who violates a lawful order of the town/village board or its administrator made under this emergency declaration shall be subject to a forfeiture of \$100 or, in default of payment of the forfeiture, shall be subject to imprisonment for six (6) months for each separate offense.

6. The town/village clerk shall publish this resolution under Wis. Stat. sec. 60.80 in the local newspaper. This resolution shall become effective upon adoption by the town/village board and the forfeiture penalties shall become effective upon publication.

Adopted this _____ day of _____, 2020.

Signatures of Town/Village Board
Attest: Signature of Clerk



OFFICE OF THE GOVERNOR

EXECUTIVE ORDER #72

Relating to a Proclamation Declaring a Health Emergency in Response to the COVID-19 Coronavirus

WHEREAS, in December, 2019, a novel strain of the coronavirus was detected, now named COVID-19, and it has spread throughout numerous countries including the United States;

WHEREAS, international organizations, the federal government, state government, and local governments are all working together to contain the further spread of the disease and treat existing cases;

WHEREAS, the World Health Organization has declared a Public Health Emergency of International Concern, and the United States Department of Health and Human Services has declared a Public Health Emergency;

WHEREAS, the State of Wisconsin has been working to protect all Wisconsinites from the spread of this disease, and to prepare for the impacts it may have on the state; and

WHEREAS, in order to protect the health and well-being of its residents, the State of Wisconsin must avail itself of all resources needed to respond to and contain the presence of COVID-19 in the State.

NOW, THEREFORE, I, TONY EVERS, Governor of the State of Wisconsin, by the authority vested in me by the Constitution and laws of this state, and specifically by Sections 100.305, 321.39, 323.10, 323.12, and 323.13 of the Wisconsin Statutes, hereby:

1. Proclaim that a public health emergency, as defined in Section 323.02(16) of the Wisconsin Statutes, exists for the State of Wisconsin.
2. Designate the Department of Health Services as the lead agency to respond to the public health emergency.
3. Direct the Department of Health Services to take all necessary and appropriate measures to prevent and respond to incidents of COVID-19 in the State.
4. Suspend the provisions of any administrative rule, if the Secretary of the Department of Health Services determines that compliance with that rule would prevent, hinder, or delay necessary actions to respond to the emergency and increase the health threat.
5. Authorize the Adjutant General to activate the Wisconsin National Guard as necessary and appropriate to assist in the State's response to the public health emergency.
6. Direct all state agencies to assist as appropriate in the State's ongoing response to the public health emergency.

7. Proclaim that a period of abnormal economic disruption, as defined in Section 100.305 of the Wisconsin Statutes, exists in the State of Wisconsin.
8. Direct the Department of Agriculture, Trade, and Consumer Protection to enforce prohibitions against price gauging during an emergency, as authorized under Section 100.305 of the Wisconsin Statutes and Chapter ATCP 106 of the Wisconsin Administrative Code.

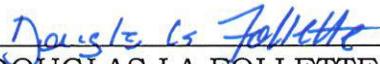


IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great seal of the State of Wisconsin to be affixed. Done at the Capitol in the City of Madison this twelfth day of March in the year of two thousand twenty.

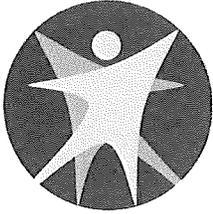


TONY EVERS
Governor

By the Governor:



DOUGLAS LA FOLLETTE
Secretary of State



State of Wisconsin
Department of Health Services

Tony Evers, Governor
Andrea Palm, Secretary

EMERGENCY ORDER #5
PROHIBITING MASS GATHERINGS OF 10 PEOPLE OR MORE

1. Under the authority of Wis. Stat. § 252.02(3) and at the direction of Governor Tony Evers, I, Andrea Palm, Secretary-designee of the Wisconsin Department of Health Services, order a statewide moratorium on mass gatherings of 10 people or more to mitigate the spread of COVID-19. This order supersedes any previous Emergency Order that conflicts with this order.
2. Effective at 5:00 p.m. on Tuesday, March 17, 2020, all public and private mass gatherings are prohibited in the State of Wisconsin.

“Mass gathering” is any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together 10 or more people in a single room or single confined or enclosed space at the same time.

All gatherings that bring together or are likely to bring together less than 10 people in a single room or confined or enclosed space at the same time must:

- a. Preserve social distancing of 6 feet between people, and
- b. Follow all other public health recommendations issued by the Wisconsin Department of Health Services and Centers for Disease Control.

Voluntary cancelation, closure, or limitations on size of gathering beyond the requirements of this order are permitted.

3. Effective at 5:00 p.m. on Tuesday, March 17, 2020, all bars and restaurants shall close in the State of Wisconsin, except as provided below for restaurants.
4. Effective at 5:00 p.m. on Wednesday, March 18, 2020, all public and private schools and institutions of higher education in the State of Wisconsin shall close for instructional and extracurricular activities at 5:00 p.m. Such institutions shall remain closed for the duration of the

public health emergency or until a subsequent order lifts this specific restriction.

This order may include, but is not limited to mass gatherings at: public or private schools, auditoriums, theaters, movie theaters, museums, stadiums, arenas, conference rooms, meeting halls, exhibition centers, taverns, health and fitness centers, recreation centers, licensed pools, and places of worship and religious gatherings.

This order exempts the following:

1. TRANSPORTATION:
 - a. Airports as long as restaurants comply with the restrictions in Section 11 below.
 - b. Mass transportation.
2. EDUCATIONAL INSTITUTIONS
 - a. Public, private, and charter schools only for noninstructional purposes, such as medication pickup, childcare services, providing meals, and when operating as polling places.
3. CHILDCARE
 - a. Childcare locations (including those that operate within a facility that is otherwise prohibited), residential care centers, and group homes.
4. HOTELS AND MOTELS
 - a. Hotels and motels as long as restaurants comply with the restrictions in Section 11 below.
5. GOVERNMENT
 - a. Military and National Guard facilities.
 - b. Law enforcement, jails, secure treatment centers, and correctional facilities, including any facility operated by the Department of Corrections, and any facility used to respond to natural disasters or public health emergencies.
 - c. State and local government facilities, including government service centers, unless prohibited elsewhere in this order or another order.
 - d. Facilities operated by the Wisconsin Legislature or Wisconsin Court System.
6. RELIEF FACILITIES
 - a. Food pantries and shelter facilities, including day centers, for individuals and families.
7. RESIDENTIAL BUILDINGS
 - a. All residential buildings.
8. RETAIL
 - a. Retail establishments, including gas stations and auto-repair facilities, where large numbers of people are present but are generally not within arm's length of one another for more than 10 minutes. Indoor shopping malls shall close.

9. HEALTHCARE

- a. All health care facilities, including hospitals, medical facilities, home health agencies, personal care agencies, hospices, adult family homes, and pharmacies;
- b. Long-term care and assisted living facilities, as long the facility follows all current Department of Health Services' Recommendations for Prevention of COVID-19 in Long-Term Care Facilities and Assisted Living Facilities and all Centers for Disease Control recommendations.
- c. Alcohol and drug treatment centers or similar facilities.

10. FACILITIES FOR VOTING

- a. Libraries when operating as polling places.

11. FOOD ESTABLISHMENTS

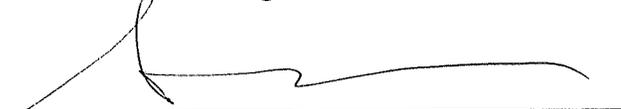
- a. Restaurants may remain open for take-out or delivery service only. No seating may be provided, and food may not be consumed at the restaurant. Restaurants shall preserve social distancing of six feet between customers during pick up.
- b. Retail food establishments (grocery stores, convenience stores, farmer's markets) as long as the requirements listed below are followed:
 - i. Close all seating intended for consuming food;
 - ii. Cease self-service operations of salad bars, beverage stations, and buffets; and
 - iii. Prohibit customers from self-dispensing all unpackaged food.

12. COMMERCIAL AND NON-PROFIT ENTITITES

- a. Office spaces. Such facilities shall implement social distancing, including teleworking, as much as practicable.
- b. Manufacturing, processing, distribution, and production facilities.
- c. Utility facilities.
- d. Job centers.

This order will remain in effect for the duration of the public health emergency declared in Governor Evers' Executive Order #72, or until a superseding order is issued.

Violation or obstruction of this order is punishable by imprisonment, fines, or both. Wis. Stat. § 252.25.



Andrea Palm
Secretary-designee
State of Wisconsin
Department of Health Services

3/17/2020
Date

Wisconsin Department of Justice

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Office of Open Government Advisory: Coronavirus Disease 2019 (COVID-19) and Open Meetings

Mar 16 2020

MADISON, Wis. – The Wisconsin Department of Justice's (DOJ) Office of Open Government (OOG) has prepared the following advisory in response to inquiries as to the applicability of the Wisconsin's open meetings law, Wis. Stat. §§ 19.81 to 19.98, in light of current public health concerns regarding COVID-19. This advisory is provided pursuant to Wis. Stat. § 19.98.

As explained below, governmental bodies typically can meet their open meetings obligations, while practicing social distancing to help protect public health, by conducting meetings via telephone conference calls if the public is provided with an effective way to monitor such calls (such as public distribution, at least 24 hours in advance, of dial-in information for a conference call).

The open meetings law states: "[I]t is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1). To that end, the law requires that "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all

times unless otherwise expressly provided by law.” Wis. Stat. § 19.81(2). A meeting must be preceded by notice providing the time, date, place, and subject matter of the meeting, generally, at least 24 hours before it begins. Wis. Stat. § 19.84.

The open meetings law “does not require that all meetings be held in publicly owned places but rather in places ‘reasonably accessible to members of the public.’” 69 Op. Att’y Gen. 143, 144 (1980) (quoting 47 Op. Att’y Gen. 126 (1978)). As such, DOJ’s longstanding advice is that a telephone conference call can be an acceptable method of convening a meeting of a governmental body. *Id.* at 146. More recently, DOJ guidance deemed video conference calls acceptable as well. Wis. Dep’t of Justice, *Wisconsin Open Meetings Law Compliance Guide* 11 (May 2019),

<https://www.doj.state.wi.us/sites/default/files/open-government/Resources/OML-GUIDE.pdf> .

When an open meeting is held by teleconference or video conference, the public must have a means of monitoring the meeting. DOJ concludes that, under the present circumstances, a governmental body will typically be able to meet this obligation by providing the public with information (in accordance with notice requirements) for joining the meeting remotely, even if there is no central location at which the public can convene for the meeting. A governmental body conducting a meeting remotely should be mindful of the possibility that it may be particularly burdensome or even infeasible for one or more individuals who would like to observe a meeting to do so remotely—for example, for people without telephone or internet access or who are deaf or hard of hearing—and appropriate accommodations should be made to facilitate reasonable access to the meeting for such individuals.

To be clear, providing only remote access to an open meeting is not always permissible, as past DOJ guidance shows. Where a complex plan, drawing, or chart is needed for display or the demeanor of a witness is significant, a meeting held by telephone conference likely would not be “reasonably accessible” to the public because important aspects of the discussion or deliberation would not be communicated to the public. See 69 Op. Att’y Gen. at 145. Further, the type of access that constitutes reasonable access in the present circumstances, in which health officials are encouraging social distancing (including avoiding large public gatherings) in order to mitigate the impact of COVID-19, may be different from the type of access required in other circumstances. Ultimately, whether a meeting is “reasonably accessible” is a factual question that must be determined on a case-by-case basis. *Id.*

If you have questions or concerns regarding the application of the open meetings law, please contact the Office of Open Government at (608) 267-2220.

 [Press Release PDF](#) 

Resources

- [Criminal Justice Coordinating Council](#)
- [File Consumer Complaint](#)
- [Wisconsin Amber Alert](#)
- [Missing and Exploited Children and Adults](#)
- [Wisconsin Alliance for Drug Endangered Children](#)
- [Wisconsin Crime Alert Network](#)
- [Wisconsin Department of Corrections](#)
- [Wisconsin Board of Commissioners of Public Lands](#)
- [Wisconsin Department of Transportation](#)
- [DOJ Media Archive](#)
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- [Guidance Documents](#)

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