



Dear TLW Member:

On May 13, 2020, the Supreme Court issued its decision in the case of *Wisconsin Legislature v. Palm*. In a **4-3 decision**, the Wisconsin Supreme Court ruled **Emergency Order #28, Safer at Home Order (Order #28)** invalid and unenforceable for failure to follow the emergency rule promulgation process under Wisconsin Chapter 227 and for exceeding the Department of Health Services (“DHS”) Secretary’s authority. The Tavern League filed an **amicus brief** in support of the Legislature in this case.

The Court’s decision takes effect immediately, meaning that – at the state level – Order #28 is unenforceable and there are no longer requirements that people remain in their homes, or restrictions on nonessential travel or business operations.

What did the Court say?

- The Court stated, “We do not conclude that Palm was without any power to act in the face of this pandemic. However, Palm must follow the law that is applicable to state-wide emergencies.”
- The Court also stated Order #28 “goes far beyond” the DHS Secretary Andrea Palm’s power under state law and she cannot confine healthy people to their homes, forbid travel or close businesses. The Court further criticized that “Palm cannot point to any procedural safeguards on the power she claims.”
- The Court made clear that Order #28 is a “rule” subject to important checks under state law. By issuing the order without going through the emergency rulemaking process, the Secretary evaded oversight and public input. The court further criticized DHS’ attempt to apply criminal penalties to a rule that was not properly promulgated.
- The Court stated: “**Rulemaking exists precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official is not imposed in Wisconsin.**”

- A concurring opinion from Justice Rebecca Bradley summarized the case this way:
 - “Under the Wisconsin Constitution, all governmental power derives ‘from the consent of the governed’ and government officials may act only within the confines of the authority the people give them. Wis. Const. art. I, § 1. The people of Wisconsin never consented to any elected official, much less an unelected cabinet secretary, having the power to create law, execute it, and enforce it... However well-intentioned, the secretary-designee of the Department of Health Services exceeded her powers by ordering the people of Wisconsin to follow her commands or face imprisonment for noncompliance. In issuing her order, she arrogated unto herself the power to make the law and the power to execute it, excluding the people from the lawmaking process altogether. The separation of powers embodied in our constitution does not permit this.”

What happens next?

The court’s decision will have important implications for the *process* and *substance* of any future regulations issued to combat COVID-19.

- The Court stated: “People, businesses and other institutions need to know how to proceed and what is expected of them. **Therefore, we place the responsibility for this future law-making with the Legislature and DHS where it belongs.**”
- Any new statewide regulations regarding COVID-19 will have to be developed through the administrative rule-making process (which provides opportunities for public input and legislative oversight) or by changes to state law passed by the Wisconsin State Legislature and signed by the Governor.
- The court decisions also identified certain limitations on the authority of DHS, stating that the agency may not confine people to their homes, forbid travel or close businesses. Any future regulations to that effect must be passed by the legislature and signed into law.

How should taverns and restaurants respond?

- While Order #28 is no longer enforceable, taverns should proceed cautiously and remain mindful of local public health orders or regulations that must be followed. Milwaukee Mayor **Tom Barrett has stated** the city’s **Stay-at-Home Order** remains in effect and **Dane County has already issued its own local order** adopting the provisions of Order #28 at the county level. Brown County has also issued a similar order. These

local orders were not challenged in the *Wisconsin Legislature v. Palm* lawsuit, and rely upon different authority. Therefore, taverns and restaurants should comply with those orders at this time.

- Taverns should also be sure to comply with **guidelines from the Wisconsin Economic Development Corporation** regarding safe business practices for bars and restaurants.
- Stay tuned - Additional state regulations may be coming in the form of an emergency rule. For now, taverns are able to reopen so long as it is not prohibited under a local ordinance.

Thank you