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## Wisconsin Supreme Court Rules Governor's Subsequent Emergency Pandemic Orders Unlawful, Immediately Suspending Statewide Mask Mandate

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Today the Supreme Court of Wisconsin issued an opinion *Fabick v. Tony Evers* declaring all but Governor Evers' first pandemic-related public health emergency executive orders, those from which he derived authority to issue statewide mask mandates, unlawful. While several of the orders (Nos. 72, 82, and 90) had already expired, the court also issued a temporary injunction of the current declaration (Executive Order No. 105) effective immediately. As a result of this decision, the Governor's statewide mask mandate issued February 4, 2021 (Emergency Order No. 1) is no longer in effect. However, the court's decision did not address or find unlawful any local face covering requirements. It also does not prohibit businesses or employers from requiring face coverings and other preventative measures pursuant to local, state, or federal public health recommendations and guidance.

The court viewed the case as a straight-forward interpretation and application of the plain meaning of Wisconsin's emergency declaration statute, Wis. Stat. § 323.10. In issuing its decision, the majority stressed that the question before the court was "not whether the Governor acted wisely; it [was] whether he acted lawfully."

Pursuant to the plain language of the statute, the court recognized the Governor's emergency powers under Wis. Stat. § 323.10 for a "public health emergency," stating that "no one disputes that COVID-19 meets this definition." However, the court found that the plain language of the statute also provides duration limitations on the Governor's orders in two ways. First, the statute plainly states that the "state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature." Second, the state of emergency "may be revoked

at the discretion of either the governor by executive order or the legislature by joint resolution.” Here, Executive Order No. 90 had been revoked by joint resolution of the legislature. While the Governor and the court’s dissenting opinion argued that the Governor has the authority to issue new or successive 60-day emergency orders, in disregarding that argument, the court’s majority explained that “[t]hese limitations would be no more perfunctory renewal requirements and would serve as merely a trivial check on indefinite emergency executive powers.”

In carrying out its interpretation of the plain meaning of the law, the court acknowledged the potentially broad-sweeping consequences of its decision: “As a necessary consequence, all executive actions and orders issued pursuant to the powers triggered by the emergency declaration are likewise void.”

As previously noted, one of the consequences is invalidating the current Wisconsin statewide mask mandate. The dissent identifies potential additional consequences impeding access to federal aid and certain medical supplies.

Moving forward, even without a Wisconsin statewide mandate, employers and businesses may not simply throw their masks in the trash. Some localities continue to have mask mandates (e.g. Dane County, Milwaukee, and Rock County). Additionally, the Centers for Disease Control (CDC) still recommends wearing facecoverings as a part of a businesses’ COVID-19 mitigation measures. As noted in our prior alert discussing Wisconsin’s COVID-19 Civil Liability Immunity statute, the opportunity for immunity from certain claims is a good incentive to follow applicable public health guidance in absence of a mandate.

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