



# WISCONSIN LEGISLATURE

P.O. Box 7882 • Madison, WI 53707-7882

October 7, 2020

Secretary-Designee Andrea Palm  
Wisconsin Dept. of Health Services  
1 W Wilson St  
Madison, WI 53703

**DELIVERED ELECTRONICALLY**

Dear Secretary-designee Palm:

Four months ago, the Supreme Court of Wisconsin held that a document issued by the Department of Health Services (DHS) that purports to “regulate[ ] all persons in Wisconsin . . . and . . . all who will come into Wisconsin in the future” is “a general order of general application” and therefore subject to the “statutory emergency rulemaking procedures established by the Legislature” in the Administrative Procedure Act (Chapter 227). *Wisconsin Legislature v. Palm*, 391 Wis. 2d 497, 517, 533 (2020). The Court also held that, when the rulemaking procedures of Chapter 227 apply but are not followed, any resulting agency directive—no matter the title the agency gives it—“is unenforceable.” *Id.* at 533.

We are in receipt of a document called “Emergency Order #3,” published yesterday. That document purports to “regulate[ ] all persons in Wisconsin . . . and . . . all who will come into Wisconsin in the future.” *Id.* at 517. It is therefore a “general order of general application” and subject to the Administrative Procedure Act’s emergency rulemaking procedures. Because DHS did not comply with those procedures before issuing this document, the order, in its current form, “is unenforceable.” *Id.* at 533. The attached memorandum from the nonpartisan Legislative Reference Bureau reaches the same conclusion. There is no serious argument to the contrary.

If DHS wishes to promulgate this document as an emergency rule, DHS should immediately prepare a finding of emergency, submit a scope statement to the Department of Administration and your office for approval, have that statement published in the state’s *Administrative Register*, and follow all other necessary steps as clearly outlined in Chapter 227. After these steps are taken, the rulemaking process can begin as provided by law.

The Joint Committee for Review of Administrative Rules stands ready to assess in due course whether this order, promulgated as an emergency rule, lacks “statutory authority,” fails “to comply with legislative intent,” “conflict[s] with state law,” is “arbitrar[y] and capriciou[s],” or “impose[s] an undue hardship.” Wis. Stat. §§ 227.26(2)(d), § 227.19(4)(d).

Sincerely,

A handwritten signature in black ink that reads "Scott Fitzgerald". The signature is written in a cursive style with a large, stylized initial 'S'.

Scott Fitzgerald  
Senate Majority Leader

A handwritten signature in black ink that reads "Robin J. Vos". The signature is written in a cursive style with a large, stylized initial 'R'.

Robin J. Vos  
Assembly Speaker

CC: Governor Tony Evers