COVID-19: Stay-at-Home order struck down by Wisconsin Supreme Court

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COVID: First of kind Wisconsin Supreme Court decision strikes down state’s stay-at-home order by vote of 4 to 3

Wisconsin Governor Tony Evers issued his stay-at-home order for nonessential businesses on March 18. On April 16, he extended the order until May 26. Reports say that the governor declined to negotiate with legislators two weeks ago on a compromise to the terms of the restrictive order, preferring to see what the court decided.

It was a winner-take-all decision. This evening, that order was invalidated and the court refused the state’s request for a six-day stay to allow GOP lawmakers and the governors to work out new rules. As a result, all state restrictions are now removed on social gatherings or business.

After a 90-minute online video conference hearing before the Wisconsin Supreme Court last week, the court today issued a decision striking down the governor’s order.

The court ruled that the government exceeded the statutory authority granted during an emergency, characterizing the order as “confining all people to their homes, forbidding travel and closing businesses.”

Justice Rebecca Bradley was one of the concurring justices. During oral arguments last week, she asked the attorneys defending Andrea Palm, Wisconsin’s top health official the following question:

Isn’t it the very definition of tyranny for one person to order people to be imprisoned for going to work, among other ordinarily lawful activities?

The state argued that the legislature gave the health department officials such power, and said people will die if the court strikes down the order.

Two justices concurring in the majority opinion would have gone further and ruled the action unconstitutional, saying:

Where in the constitution did the people of Wisconsin confer authority on a single, unelected Cabinet secretary to compel almost 6 million people to stay at home and close their businesses and face imprisonment if they don’t comply, with no input from the legislature, without the consent of the people?

An amicus brief filed by the Wisconsin Institute for Law and Liberty said:
The court’s decision ensures that Wisconsin’s response to COVID-19 must involve both the executive and the legislative branch . . . Wisconsin will be better for it.

The grave nature of the pandemic cannot be used to subvert our very form of government.

**Intense partisan struggle nationwide**

The Wisconsin Supreme Court ruling comes in the middle of a very intense battle raging in many states. It raises the question of whether extended or indefinite stay-at-home orders are vulnerable.

This ruling was confined to an interpretation of emergency powers under Wisconsin law. That limitation may restrict the impact of the decision, but the broader question remains open — the balance between safety and civil liberties.

This is Jim Butler, author of [www.HotelLawBlog.com](http://www.HotelLawBlog.com) and founding partner of JMBM and JMBM’s Global Hospitality Group®. We provide business and legal advice to hotel owners, developers, independent operators and investors. This advice covers critical hotel issues such as hotel purchase, sale, development, financing, franchise, management, ADA, and IP matters. We also have compelling experience in hotel litigation, union avoidance and union negotiations, and cybersecurity & data privacy.

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