

FILED
10-13-2020
Clerk of Circuit Court
Sawyer County, WI
2020CV000128

STATE OF WISCONSIN : CIRCUIT COURT : SAWYER COUNTY

TAVERN LEAGUE OF WISCONSIN,
INC., SAWYER COUNTY TAVERN
LEAGUE, INC., FLAMBEAU FOREST
INN LLC,

Plaintiffs,

v.

ANDREA PALM, in her official capacity
as Secretary-Designee of the Wisconsin
Department of Health Services,
1 West Wilson Street,
Madison, Wisconsin 53703,

WISCONSIN DEPARTMENT OF
HEALTH SERVICES,
1 West Wilson Street,
Madison, Wisconsin 53703, and

JULIA LYONS, in her official capacity
as Health Officer of Sawyer County
Sawyer County Health & Human Services
10610 Main Street, Suite 224
Hayward, WI 54834,

Defendants.

Case No.

Code No(s). 30701, 30607 (Declaratory
Judgment; Administrative
Agency Review)

SUMMONS

THE STATE OF WISCONSIN,

To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the Court, whose address is Sawyer County Courthouse, 10610 Main Street, Suite 74, Hayward, WI 54843, and to Godfrey & Kahn, S.C., Attention: Josh Johannningmeier and Zachary Bemis, P.O. Box 2719, Madison, WI 53718. You may have an attorney help or represent you.

If you do not provide an answer within forty-five (45) days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future and may also be enforced by garnishment or seizure of property.

Dated: October 13, 2020

Respectfully submitted,

GODFREY & KAHN, S.C.

Electronically signed by Josh Johannningmeier

Josh Johannningmeier (#1041135)

Zachary Bemis (#1094291)

One East Main Street, Suite 500

P.O. Box 2719

Madison, WI 53701-2719

Phone: 608-257-3911

Fax: 608-257-0609

Email: jjohanningmeier@gklaw.com

zbemis@gklaw.com

Attorneys for Plaintiffs

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COMPLAINT

Plaintiffs Tavern League of Wisconsin, Inc. (“TLW”), Sawyer County Tavern League, Inc. (“SCTL”), and Flambeau Forest Inn LLC (“Flambeau”) (collectively, “Plaintiffs”), by their undersigned attorneys, hereby allege as follows:

INTRODUCTION

1. This is an action challenging Emergency Order #3, issued by Department of Health Services Secretary-Designee Andrea Palm on October 6, 2020. A copy of Emergency Order #3 is attached as Exhibit 1.

2. Emergency Order #3 applies to all “places that are open to the public” including “rooms within a business location, store, or facility that allow members of the public to enter.” *Id.* at 3. As such, it is a general order of general application within the meaning of Wis. Stat. § 227.01(13)—in other words, it is a rule.

3. In order to promulgate a rule, DHS must follow the specific rulemaking procedures detailed in Chapter 227 of the Wisconsin Statutes. Indeed, the Wisconsin Supreme Court specifically underscored these requirements for DHS and Secretary-Designee Palm just five months ago in *Wisconsin Legislature v. Palm*, 942 N.W.2d 900, 2020 WI 42 (2020), which struck down DHS’s Emergency Order #28 for failing to follow those rulemaking procedures.

4. Emergency Order #3 also purports to regulate businesses and public gatherings in a manner nearly identical to portions of Emergency Order #28. Through both orders Secretary-Designee Palm attempted to issue capacity restrictions on indoor locations to limit public gatherings through the interpretation and implementation of Wis. Stat. § 252.02(3).

5. Yet despite these abundant similarities, in issuing Emergency Order #3 last week, Palm and DHS once again failed to follow any of Chapter 227’s rulemaking procedures—a move

that brazenly flouts Chapter 227 and the Wisconsin Supreme Court's specific direction in *Palm*. Emergency Order #3 is therefore invalid and unenforceable.

PARTIES

6. Plaintiff Tavern League of Wisconsin, Inc. is the largest hospitality industry trade association in the State of Wisconsin, representing more than 5,000 bars, taverns, and restaurants. TLW maintains its office at 2817 Fish Hatchery Road Fitchburg, Wisconsin 53713. TLW regularly represents its members before the State Legislature, the Governor's Office, and various state agencies. TLW's existing members, and any newly established bar or restaurant in this state that might join the TLW, are directly impacted by capacity restrictions created by Emergency Order #3. Pursuant to § 184.70, TLW has associational standing to assert this claim on behalf of its members.

7. Plaintiff Sawyer County Tavern League, Inc. is a local chapter of the TLW, whose membership includes 41 bars, taverns, and restaurants in Sawyer County, Wisconsin. SCTL holds monthly meetings at the establishments of its various members.

8. Plaintiff Flambeau Forest Inn LLC is a bar, restaurant, and motel located at W980 County Road W, Winter, Wisconsin 54896 in Sawyer County.

9. Defendant Andrea Palm is the Secretary-Designee of the Wisconsin Department of Health Services and is sued in her official capacity. Defendant Palm issued Emergency Order #3, which purports to institute capacity restrictions on Plaintiff Flambeau's business and the businesses of Plaintiffs TLW and SCTL members.

10. Defendant Wisconsin Department of Health Services is charged with maintaining a public health system under Wisconsin law and issued Emergency Order #3.

11. Defendant Julia Lyons is the local public health officer for Sawyer County.

Wisconsin state statutes direct local public health officers to enforce communicable disease and public health statutes and rules.

JURISDICTION AND VENUE

12. This Court has jurisdiction to hear this case pursuant to Wis. Stat. §§ 227.40 and 806.04.

13. Venue in this County is proper pursuant to Wis. Stat. §§ 227.40 and 801.50(3)(b) because Plaintiffs SCTL and Flambeau are located in this County.

STATEMENT OF FACTS

Facts Related to Emergency Order #3

14. On October 6, 2020, Defendant Palm issued Emergency Order #3, which took effect October 8, 2020 at 8:00 a.m. and is currently scheduled to end on November 6, 2020.

15. Emergency Order #3 enacts capacity restrictions that apply broadly to all “Public Gatherings” in the state of Wisconsin, unless a specific exemption applies. Ex. 1 at 3.

16. The Order defines “public gathering” to mean “an indoor event, convening, or collection of individuals, whether planned or spontaneous, that is open to the public and brings together people who are not part of the same household in a single room.” *Id.* The Order further defines places “open to the public” to include “[r]ooms within a business location, store, or facility that allow members of the public to enter” and “[t]icketed events where tickets are available for free or for purchase by any individual or by any individual within a specific class of people.” *Id.*

17. Under the Order, “[p]ublic gatherings are limited to no more than 25% of the total occupancy limits for the room or building, as established by the local municipality” or “[f]or

indoor spaces without an occupancy limit for the room or building that is established by the local municipality, such as a private residence, public gatherings are limited to no more than 10 people.” *Id.* at 3-4. Employees of a place open to the public are not excluded from the capacity limits established in the Order. *Id.*

18. Emergency Order #3 purports to be issued pursuant to authority under Wis. Stat. § 252.02(3). *Id.* at 3. Violations of Emergency Order #3 are punishable by a civil forfeiture of not more than \$500 per violation. *Id.* at 6 (citing Wis. Stat. § 252.25).

19. Wis. Stat. § 227.24 provides various rulemaking procedures that must be followed in promulgating an emergency rule. In promulgating Emergency Order #3, Defendants did not follow the rulemaking procedures of Wis. Stat. § 227.24.

20. On October 7, 2020, a senior coordinating attorney at the Wisconsin Legislative Reference Bureau provided to Assembly Speaker Robin Vos a memorandum concluding that a “court following the reasoning of *Wisconsin Legislature v. Palm* would likely require Emergency Order #3, which limits public gatherings, to be promulgated as a rule.”

21. The next day, on October 8, 2020, the same senior attorney provided to State Senate Minority Leader Janet Bewley a memorandum noting that “even if enforceability of Emergency Order #3 is questioned, the order remains in effect until one of the following occur: 1) a court issues an order enjoining DHS from enforcing Emergency Order #3 or an order ruling the Emergency Order #3 unenforceable, 2) Secretary-Designee Palm voluntarily terminates the order for any reason, or 3) the expiration date specified in the order, November 6, 2020, is reached.

22. Pursuant to Wis. Stat. § 227.26(2)(b), the Joint Committee for Review of Administrative Rules (“JCRAR”), if it determines that a statement of policy or an interpretation

of a statute meets the definition of a rule, may direct the agency to promulgate the statement or interpretation as an emergency rule.

23. On October 9, 2020, in response to the improper issuance of Emergency Order #3, the JCRAR noticed an Executive Session pursuant to Wis. Stat. § 227.26(2)(b) to review Emergency Order #3. On October 12, 2020, the JCRAR determined that “the policy statements and interpretations of ch. 252, Stats., by the Department of Health Services, as described in Sections 1. to 8. of Emergency Order #3, *Limiting Public Gatherings* (October 6, 2020), meet the definition of a rule under Wis. Stat. § 227.01(13).” The JCRAR further “direct[ed] the agency to promulgate such policy statements and interpretations as an emergency rule within 30 days.” However, the action by the JCRAR does not suspend the enforcement of Emergency Order #3.

24. In fact, Governor Evers doubled-down on Emergency Order #3, stating in a press conference the next day: “There is no reason to have . . . a rule. We don’t have a rule prepared. There is no reason to have a rule prepared because we have an emergency order that is in place in the State of Wisconsin.” *See Wis. Eye* (Oct. 13, 2020), <https://wiseye.org/2020/10/13/wisconsin-dhs-media-briefing-on-covid-19-for-october-13/>.

Facts Related to Plaintiffs

25. Plaintiff Flambeau has been operating as bar, restaurant, and motel at its present location in the Town of Winter since 1958 and under its present owners since 2013.

26. Flambeau is operated by its two owners and three additional regular employees. Flambeau does not have an established capacity restriction (and thus would be subject to the 10-person capacity under Emergency Order #3). Flambeau’s dining space includes seating for 60 people, and its bar has seating for an additional 25 patrons.

27. Since the emergence of COVID-19, Flambeau has suffered a substantial decrease in business, in spite of shifting to provide take-out.

28. Flambeau has also voluntarily decreased its capacity from 60 dining seats to 48 to allow more socially distanced dining, including for their popular Friday fish fry and Saturday prime rib specials.

29. If Flambeau were forced to operate at a 10-person capacity, it could only include five customers onsite with the five staff normally required to operate the bar and restaurant. This would be approximately 5% of Flambeau's normal seating capacity. Flambeau could not operate profitably under these conditions and would be forced to discontinue its business operations.

30. Plaintiff TLW represents more than 5,000 bars, taverns, and restaurants, dozens of which are also members of Plaintiff SCTL. Plaintiff TLW regularly represents its members in the state policy-making process, including in hearings on administrative rules and emergency rules.

31. Many of Plaintiff TLW's members and approximately all of Plaintiff SCTL's members operate establishments without occupancy limits established by the local municipality. Under Emergency Order #3, these establishments would be forced to limit their attendance to no more than 10 people, regardless of the size of the establishment.

32. Hundreds, if not thousands, of TLW's members face the same business reality as Flambeau: the capacity restrictions of Emergency Order #3 are so severe that, if it is enforced, these members could not operate profitably and would be forced to discontinue business operations.

CAUSE OF ACTION

COUNT ONE – DECLARATORY RELIEF UNDER WIS. STAT. §§ 227.40 AND 804.06

33. Plaintiffs reallege and incorporate by reference all of the allegations made above as if they were fully set forth herein.

34. Under Chapter 227 of the Wisconsin Statutes and the Wisconsin Supreme Court's decision in *Palm*, Emergency Order #3 is a rule because it is a general order of general application

35. Wis. Stat. § 227.24 provides various rulemaking procedures that must be followed in promulgating an emergency rule.

36. Emergency Order #3 was promulgated without compliance with statutory rule-making procedures.

37. The substantial rights of Plaintiffs have been prejudiced and they have been harmed because Emergency Order #3 failed to comply with these rule-making procedures.

38. This Court has authority to declare an agency rule invalid if the rule “violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures.” Wis. Stat. § 227.40(4)(a).

39. Plaintiffs are therefore entitled to have Emergency Order #3 declared invalid.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask the Court to grant the following relief:

1. A declaration that Emergency Order #3 is invalid;
2. A temporary restraining order and temporary injunction barring enforcement of Emergency Order #3, pending the final resolution of this case;
3. A permanent injunction barring enforcement of Emergency Order #3; and

4. Such other and/or additional relief as equity and the nature of the case may require, including but not limited to the award of attorneys' fees and costs.

Dated: October 13, 2020

Respectfully submitted,

GODFREY & KAHN, S.C.

Electronically signed by Josh Johanningmeier

Josh Johanningmeier (#1041135)

Zachary Bemis (#1094291)

One East Main Street, Suite 500

P.O. Box 2719

Madison, WI 53701-2719

Phone: 608-257-3911

Fax: 608-257-0609

Email: jjohanningmeier@gklaw.com

zbemis@gklaw.com

Attorneys for Plaintiffs

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Exhibit 1



State of Wisconsin
Department of Health Services

Tony Evers, Governor
Andrea Palm, Secretary

EMERGENCY ORDER #3

LIMITING PUBLIC GATHERINGS

The State of Wisconsin is in the midst of a deadly, uncontrolled, and exponentially growing spike in cases of COVID-19. The State is the nation's COVID-19 hot spot, and intervening measures are necessary to slow the rampage of illness and death caused by the virus.

Without a vaccine, the only tools to slow the spread of COVID-19 are wearing a face covering in public, staying at least six feet away from other people when you leave your home, washing your hands regularly, and staying home as much as possible. Without using these simple but vital life-saving tools, Wisconsin will suffer from unnecessary illness and death.

During the first three months of the pandemic (March-May), when Wisconsin's mass gathering bans and Safer at Home orders were in place, Wisconsin experienced a total of 20,000 cases of COVID-19. However, after the Legislature sued to end Safer at Home, which the Wisconsin Supreme Court ended on May 13, 2020, the spread of the virus rapidly accelerated. Wisconsin's next 20,000 cases occurred over six weeks and the subsequent 20,000 occurred in only three weeks.

Wisconsin is now a COVID-19 hotspot. It had the third highest number of new cases in the past seven days (17,641 cases), with only California and Texas having more new cases (and 6.8 times and 5 times the population, respectively). Wisconsin is also third in the nation in new cases per 100,000 residents (303 cases per 100,000 residents in the past seven days), with only North Dakota and South Dakota having higher rates. Compared to neighboring states that have statewide mitigation efforts in place, Wisconsin's increase in cases (17,641) over the last 7 days is more than double both Minnesota's increase (7,093 cases) and Michigan's increase (6,878 cases) (New York Times, October 5, 2020).

Wisconsin must use all its tools, including keeping people physically apart and wearing face coverings, to slow this dangerous spike. The consequences of failing to act could be devastating and deadly. Because of the time period between infection, diagnosis, and the development of serious symptoms, hospitalizations and deaths lag behind case counts. Wisconsin is now experiencing increases in

both of these serious indicators because of the steep rise in cases of COVID-19 over the past month.

Hospital capacity strains in some parts of the state are at record high levels. The State of Wisconsin is divided into seven healthcare emergency readiness coalition regions (HERC regions), which coordinate how public health, healthcare institutions, and first responder agencies respond to health emergencies and catastrophic events.

As of September 29, every HERC region in the state has very high disease activity level (i.e., greater than 350 cases per 100,000 population during the past two weeks). On July 29, 2020, while all of the HERC regions had a high disease activity level (i.e., greater than 100 cases and less than 350 cases per 100,000 population during the past two weeks), none of the HERC regions were experiencing a very high disease burden.

This high level of disease activity is now manifesting itself with increased hospitalizations. On September 3rd, there were 293 patients hospitalized with COVID-19 in Wisconsin. One month later, on October 3rd, this number had more than doubled to 692 patients across the state and more than quadrupled in the Fox Valley, Northeast, Northwest, Northcentral, and Western regions of the state. Hospital leaders in Green Bay, Appleton, Neenah, and Wausau are reporting ICU's at capacity, transfers of patients to other facilities, and critical staffing shortages.

Over the past six months, significant gains have been made in the care for patients with COVID-19; however, despite these gains, the disease continues to take the ultimate toll for too many Wisconsinites. On September 4th, the average number of newly reported deaths among patients with COVID-19 over the past seven days was six. By October 4th, this average had doubled to fourteen. In the first six months of the COVID-19 pandemic, 1,242 deaths were reported across the state. In comparison, during the 2019-2020 influenza season, there were 183 deaths from influenza in our state. Assuming deaths increase at the same rate, COVID-19 would rank as the sixth leading cause of death in Wisconsin in 2020 behind only heart disease, cancer, unintentional injuries, lower respiratory disease, and stroke.

While the current death rate for COVID-19 is 1.1% of all cases, the risk of death increases with age. In Wisconsin, 23% of people in their nineties, 14% of people in their eighties, and 5% of people in their seventies who contract COVID-19 die. The lower overall mortality rate is a reflection of the disproportionate representation of the disease in younger populations where 55% of all Wisconsin COVID-19 cases have been diagnosed in people under age 40 and 92% in people under age 70.

For these reasons, I, Andrea Palm, Department of Health Services Secretary-designee, in fulfilling my constitutional duty under Article I, Section I, as part of the government instituted by the people to secure the rights of all people to life, liberty, and the pursuit of happiness, the Laws of this State including Section 252.02(3) of the Wisconsin Statutes, and consistent with *Wisconsin Legislature v. Palm*, 2020 WI 42, order the following:

1. Definitions.

- a. Public gathering** means an indoor event, convening, or collection of individuals, whether planned or spontaneous, that is open to the public and brings together people who are not part of the same household in a single room.
- i.** Places that are **open to the public** include, but are not limited to:
1. Rooms within a business location, store, or facility that allow members of the public to enter.
 2. Ticketed events where tickets are available for free or for purchase by any individual or by any individual within a specific class of people.
- ii.** Places that are **not open to the public**, and therefore are not part of the definition of a public gathering and are not limited by this order, include, but are not limited to:
1. Office spaces, manufacturing plant, and other facilities that are accessible only by employees or other authorized personnel.
 2. Invitation-only events that exclude uninvited guests.
 3. Private residences. Except, a residence is considered open to the public during an event that allows entrance to any individual; such public gatherings are limited to 10 people.

2. Public gatherings limited.

- a.** Public gatherings are limited to no more than 25% of the total occupancy limits for the room or building, as established by the local municipality.
- b.** For indoor spaces without an occupancy limit for the room or building that is established by the local municipality, such as a

private residence, public gatherings are limited to no more than 10 people.

- c.** The following are exempt from limitations on public gatherings:
- i.** Child care settings, including all licensed and certified child care providers who provide care for any age or ages of children up to 13 years of age or children with disabilities up to 19 years of age; Head Start and Early Head Start programs; programs providing before or after school care or virtual learning support during the school day.
 - ii.** Placements for children in out-of-home care, including but not limited to residential care centers, group homes, foster homes, and shelter care; overnight service providers for homeless and runaway youth.
 - iii.** 4K-12 schools.
 - iv.** Institutions of higher education.
 - v.** Health care and public health operations, which includes: hospitals; medical facilities; clinics; ambulatory surgery centers for response to urgent health issues or related COVID-19 activities; manufacturers, technicians, logistics, and warehouse operators and distributors of medical equipment, personal protective equipment (PPE), medical gases, pharmaceuticals, blood and blood products, vaccines, testing materials, laboratory supplies, cleaning, sanitizing, disinfecting or sterilization supplies, and tissue and paper towel products; dental offices; pharmacies; public health entities, including those that compile, model, analyze, and communicate public health information; pharmaceutical, pharmacy, medical device and equipment, and biotechnology companies (including operations, research and development, manufacture, and supply chain); healthcare information technology companies; organizations collecting blood, platelets, plasma, and other necessary materials; obstetricians, gynecologists, and midwife practices; eye care centers, including those that sell glasses and contact lenses; home health agencies and providers; mental health and substance abuse providers; detoxification and alcohol or drug treatment programs and facilities; syringe access programs, and naloxone distribution programs; other healthcare facilities and suppliers and providers of any related or any ancillary healthcare services; entities that transport and

dispose of medical materials and remains; personal care agencies; hospices; allied health providers; veterinary care; acupuncturists; massage therapists; chiropractors; and adult family homes.

- vi.** Human services operations, which includes: long-term care and assisted living facilities, as long as the facility follows all current DHS Recommendations for Prevention of COVID-19 in Long-Term Facilities and Assisted Living Facilities and all applicable U.S. Centers for Disease Control Recommendations; residential settings and shelters for adults, seniors, children, victims of domestic abuse, people with disabilities, people with substance use disorders, or mental illness; transitional facilities; home-based settings to provide services to individuals with physical, intellectual, or developmental disabilities, seniors, adults, or children; adult day care, adult day services, and supportive home care; field offices that provide and help to determine eligibility for basic needs including food, cash assistance, medical coverage, vocational services, or rehabilitation services; developmental centers; adoption agencies; businesses that provide food, shelter, social services, or other necessities of life for economically disadvantaged individuals, individuals with physical, intellectual, or developmental disabilities, or otherwise needy individuals.
- vii.** Public Infrastructure operations, which includes: food production, food distribution and fulfillment centers, food storage facilities; construction; building management and maintenance; airports and airport operations; utilities operation and maintenance, including water, sewer, gas, and electric (including power generation, distribution, production of raw materials, and Wisconsin Department of Natural Resources-certified and registered drinking water and wastewater testing laboratories); Wisconsin Home Energy Assistance, Low Income Home Energy Assistance Program, and Public Benefits Energy Assistance Program offices, customer service centers, and public intake centers; oil and biofuel refining; roads, highways, railroads, and public transportation; ports; cybersecurity operations; flood control; solid waste and recycling collection and removal; and internet, video, and telecommunications systems.
- viii.** State and local government operations and facilities, including polling locations.

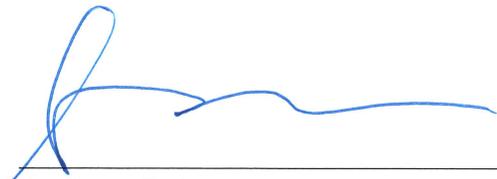
- ix.** Churches and other places of religious worship.
 - x.** Political rallies, demonstrations, and other speech protected by the First Amendment.
 - xi.** State facilities under the control of the Wisconsin Supreme Court and the Wisconsin Legislature.
 - xii.** Federal facilities under the control of the federal government.
- 3. Public health directives and orders.** All individuals are strongly encouraged to take personal responsibility for following public health guidance from local health officials, the [Department of Health Services](#), and the [Center for Disease Control](#). Individuals must follow all directives and orders issued by local or state authorities regarding measures to combat COVID-19, including any local or state orders regarding wearing face coverings.

ENFORCEMENT AND APPLICABILITY

4. Tribal Nations.

- a.** These restrictions do not apply to activities by Tribal members within the boundaries of their Tribal reservations and federal land held in trust for any one of the eleven federally recognized Tribes in Wisconsin, but Tribal members may be subject to restrictions by Tribal authorities.
 - b.** Non-tribal members should be respectful of and avoid non-essential travel to Tribal territory.
 - c.** Wisconsin's local governments shall coordinate, collaborate, and share information with the Tribal Nations in their region.
- 5. Local Orders.** Local governments may issue orders that are more restrictive than the provisions in this order.
- 6. Enforcement.** This order is enforceable by civil forfeiture. Wis. Stat. § 252.25; *Legislature v. Palm*, 2020 WI 42.
- 7. Severability.** If any provision of this order or its application to any person or circumstance is held to be invalid, then the remainder of the order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this order are severable.

8. Duration. This order shall become effective at 8:00 a.m. on October 8, 2020. This order shall remain in effect for two incubation periods of COVID-19, which will end November 6, 2020.



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

10/08/2020

Date