Governing Wisconsin
From the Wisconsin Legislative Reference Bureau

The Executive Order

The Wisconsin Constitution divides power among the legislative, executive, and judicial branches of government, assigning each branch both unique and shared powers. The constitution vests the executive power in the governor, and requires the governor to "transact all necessary business with the officers of the government,…expedite all such measures as may be resolved upon by the legislature, and…take care that the laws be faithfully executed" (article V, section 4).

The governor manages state government operations and the implementation of laws. The legislature has enacted laws affecting most activities of everyday life and has created state agencies to enforce the laws. With a few exceptions, the governor directs the activities of state agencies. State agencies promulgate administrative rules, develop guidelines, and carry out the duties and exercise the powers delegated to them by law.

What Is an Executive Order?

Governors have many tools to coordinate state government business and ensure that the laws are faithfully executed. One important tool is the executive order. Executive orders are not defined by law and courts have not identified when executive orders have the force of law. Even the constitution is silent about executive orders. Nevertheless, an executive order is best understood as a formal declaration by the governor, reduced to writing and deposited with the secretary of state, which may have the force of law if issued pursuant to authority granted the governor under the statutes or the constitution.

The widespread use of executive orders is a recent phenomenon. From 1947 to 1965, for instance, governors issued fewer than ten executive orders. But with the growth of the executive branch, the increasing complexity of policy issues, and the challenges in coordinating state agency activities, governors have issued executive orders with more frequency. By 2000, in fact, governors had issued more than 500 executive orders. This trend continued during Governor Doyle's administration, with his issuing over 320 executive orders. And in his first year in office, Governor Scott Walker issued 54 executive orders, continuing the pace of his recent predecessors.

Delegation of Legislative Power

The legislature has given the governor the power to accomplish certain objectives by executive order. For example, the governor may issue an executive order requiring prior approval for out-of-state travel by state employees. Also, the governor may assign certain employment and education programs by executive order. These are limited grants of power that deal narrowly with state agency activities.

But the legislature has also authorized the governor to issue executive orders with far-reaching effects. For example, in 2010, the legislature authorized the governor to extend unemployment benefits by executive order. Also, the governor may issue an executive order to grant pay benefits for state employees who are activated into the U.S. armed forces. Finally, the governor can declare a state emergency by executive order. As these examples show, the governor can direct the expenditure of millions of state dollars, affecting the lives of most Wisconsin residents, simply by issuing an executive order.

Usually, the legislature does not give the governor the power to govern by executive order. Instead, the legislature usually requires state agencies to exercise powers and carry out duties according to law. Still, there are good reasons for delegating to the governor the power to achieve policy goals by executive order. After all, the governor can act quickly by executive order, whereas a state agency may face bureaucratic hurdles. If the legislature provides clear standards when executive orders may be issued, an executive order may be an appropriate and powerful tool for government.

The governor may also be in a better position to pursue the administrative goals across state agencies by issuing an executive order

instead of having each state agency do this on its own. In this way, agencies may have less discretion in implementing directives that affect all agencies. Finally, as an elected official, the governor is more accountable to the public than are state agency heads or career civil service employees.

The Executive Power

Executive orders are not mentioned in the Wisconsin Constitution. Instead, the executive power is assigned to the governor, and the governor is directed to "take care that the laws be faithfully executed" (article V, section 4). These duties require the governor, from time to time, to issue directives to state actors. A directive may be formal or informal, depending on the situation. The public can hold a governor accountable for his or her actions only if those actions are public and documented. An executive order is a formal, written declaration of such a directive—it forces the governor to take responsibility for a course of action and makes that action more transparent to the public.

Recent governors have issued executive orders to call the legislature into special session, call special elections, order the flag flown at half-staff, proclaim states of emergency, direct agencies to engage in specific actions, and set standards for agency actions relating to federal programs. If the governor issues an executive order based on constitutional authority, provided the order does not conflict with law, the order may have the force of law. At the very least, state agency heads will follow an executive order for the simple reason that they usually serve at the pleasure of the governor.

An example of a far-reaching executive order was Governor Doyle's Executive Order #285, which imposed a 16-day unpaid furlough for all state employees during 2009–11 and ordered state agencies to close on certain days. In the executive order, the governor cited his constitutional powers and the authority granted the governor by the legislature. The executive order was sweeping in scope, reducing state expenditures by over $192,000,000. That the governor could impose pay reductions for tens of thousands of state employees by the simple stroke of a pen reveals the power of executive orders to alter state government operations and the expenditure of state funds.

The Future of Executive Orders

While executive orders may affect many operations of state government and provide the governor with greater say in the execution of the laws, most executive orders are limited in scope. Most executive orders are simple proclamations, honoring state residents who have lost their lives in combat, in which the governor orders the flag flown at half-staff at all state buildings, grounds, and military installations. Executive orders affecting a broad sweep of state agency operations and the manner in which the laws are executed remain the exception.

Governors may exert their influence in informal ways, through meetings with cabinet officers, issuing press releases, or even conducting press conferences. An executive order is a formal instrument that has the force of law if issued on the basis of statutory or constitutional authority. If a governor finds it difficult to achieve policy goals through legislation, he or she may be tempted to achieve the same goals through executive orders.

But there are risks to government by executive order. After all, the governor may issue executive orders that exceed what is permitted under the constitution and by statute. Also, the legislature may require the governor to pursue policy goals by executive order without providing the governor with clear standards to use this power. The future challenge for both governors and the legislature is to carve out situations where executive orders are appropriate and responsive tools for achieving public policy goals. This will not be an easy task; it will require governors to be moderate in their use of executive orders, recognizing that the legislature is the lawmaking body of state government. In addition, it will require the legislature to adopt clear standards and provide direction to the governor whenever the legislature authorizes the governor to achieve public policy goals by executive order.

By Richard Champagne,
Senior Attorney
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Study Questions

1	Can the executive director of a state agency issue an executive order?	
2	In the past 10 or 20 years, what has been the trend in the number of executive orders issued?	
3	Would an executive order ever apply to or involve the legislature or the courts?	
4	Does the executive order have the force of law in all cases? When would it not?	
5	Besides the executive order, what other methods are available for a governor to accomplish his or her goals?	
6	When does an executive order run afoul of the constitution? Provide an example.	

Governing Wisconsin: "Executive Orders"

Study Questions in the Cognitive Domain

1	Can the executive director of a state agency issue an executive order?	No, only the governor may issue executive orders.	Cognition
2	In the past 10 or 20 years, what has been the trend in the number of executive orders issued?	The number of executive orders has greatly increased compared to the middle-20th century.	Comprehension
3	Would an executive order ever apply to or involve the legislature or the courts?	The governor can issue orders that formalize an exercise of authority he or she already has. The governor has no authority to give orders to the legislature or the courts, which would usually get involved only if the governor exceeded his or her authority in an executive order.	Application
4	Does the executive order have the force of law in all cases? When would it not?	Generally, the executive order has the force of law because it exercises the legitimate power of the governor. If the governor attempted to exercise powers contrary to the law or the constitution, the executive order would clearly not have the force of law.	Analysis
5	Besides the executive order, what other methods are available for a governor to accomplish his or her goals?	A governor can implement policy in a number of ways. He or she can propose legislation, make speeches and other public appeals, join lawsuits, and appoint agency directors who will follow the governor's policy.	Synthesis
6	When does an executive order run afoul of the constitution? Provide an example.	An order would run afoul of the constitution, generally, if the order violated the separation of powers by exercising legislative or judical powers. Students could suggest an example such as an executive order increasing the number of seats on the supreme court.	Evaluation