

# WISCONSIN

## CONSTITUTIONAL AND STATUTORY PROVISIONS

### **Wisconsin Constitution**

- Article XI, § 3. Municipal home rule; debt limit; tax to pay debt

(1) Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

### **Wisconsin Statutes**

- WIS. STAT. § 66.0101(4) (2017). Exercise of Home Rule.

A city or village may elect under this section that any law relating to the local affairs and government of the city or village other than those enactments of the legislature of statewide concern as shall with uniformity affect every city or every village shall not apply to the city or village, and when the election takes effect, the law ceases to be in effect in the city or village.

- *Id.* § 62.11(5). Cities Common Council Powers.

Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

- *Id.* § 59.03 County Home Rule.

Every county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county.

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## HOME RULE STRUCTURE

In 1924, the Wisconsin Constitution was amended to establish municipal home rule. The constitutional amendment made a direct grant of legislative power to cities and villages and it

limited the powers of the legislature.<sup>1</sup> The legislature has supplemented the constitutional home rule provision with statutory grants of authority, as articulated in WIS. STAT. § 62.115.

#### LIMITED IMMUNITY FROM STATE PREEMPTION

Wisconsin's constitutional and statutory combination establishes a two-track approach to preemption. The short of it is that the legislature can preempt any local enactment that it wants, but the constitution may constrain the way in which it preempts. For charter ordinances and ordinances related to "local affairs and government," preemption must be "uniform" as to all cities or must relate to a statewide concern.<sup>2</sup> Facial uniformity is sufficient.<sup>3</sup> With respect to matters of statewide concern, cities enjoy broad presumptive powers under the statutory grant of the police power,<sup>4</sup> but the state legislature may preempt in any manner.<sup>5</sup> Wisconsin courts recognize implied preemption where the challenged ordinance is logically inconsistent with state legislation or infringes on "the spirit of a state law or general policy of the state."<sup>6</sup>

The case law on the distinction between local and statewide affairs, while voluminous, is relatively unimportant these days.<sup>7</sup> Older Wisconsin decisions were more inclined to protect "local matters," thus making the distinction more important then.<sup>8</sup> Recent decisions have either found a "statewide interest" in state legislation preempting local law, or have found that the state legislature acted uniformly, either of which is now sufficient to preempt even "local concerns." Prominent cases include the affirmance of preemption of municipal employee residence requirements<sup>9</sup> and local retirement benefits.<sup>10</sup> In each of these cases, more than one justice disagreed with the majority's interpretation of the Home Rule Amendment and argued for more

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<sup>1</sup> See *State v. City of Milwaukee*, 209 N.W. 860, 861 (Wis. 1926) (analyzing home rule amendment passed two years earlier).

<sup>2</sup> *Black v. City of Milwaukee*, 882 N.W.2d 333, 337 (Wis. 2016); *but see id.* at 354 (Rebecca Bradley, J., concurring) (arguing that under Home Rule Amendment, preemptive legislation must relate to statewide concern and apply uniformly).

<sup>3</sup> *Id.* at 336.

<sup>4</sup> *E.g.*, *Metro. Mil. Ass'n of Commerce, Inc. v. City of Milwaukee*, 798 N.W.2d 287 (Wis. 2011) (upholding Milwaukee paid sick leave ordinance before state expressly preempted).

<sup>5</sup> See *Wis. Ass'n of Food Dealers v. City of Madison*, 293 N.W.2d 540, 543 (Wis. 1981) ("Because the statewide concern is paramount, Madison's power to adopt an ordinance in this area must come from a source other than the home-rule amendment . . ."); WIS. STAT. §§ 66.0101(4); 62.11(5) (2017).

<sup>6</sup> *Local Union No. 487, IAFF-CIO v. City of Eau Claire*, 433 N.W.2d 578, 580 (Wis. 1989) (citing *Wis. Ass'n of Food Dealers*, 97 Wis. 2d at 432-33).

<sup>7</sup> For an example of a state supreme court case wrestling with the statewide-local distinction, see *State ex rel. Michalek v. LeGrand*, 253 N.W.2d 505, 507-08 (Wis. 1977).

<sup>8</sup> *E.g.*, *State v. City of Milwaukee*, 209 N.W. 860, 863 (Wis. 1926) (finding that a state law limiting the height of buildings in first-class cities to 125 feet was a local affair under the home rule constitutional amendment and, as a result, the city of Milwaukee could exempt itself from that state law by adopting a charter ordinance to that effect).

<sup>9</sup> *Black*, 882 N.W.2d at 338 (concluding that legislature "uniformly" preempted local residency requirements, even if such requirements amounted to "local concerns");

<sup>10</sup> *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337 (Wis. 2014) (upholding statewide prohibition on first-class cities' contributing to municipal employees' retirement accounts because state law addressed area that was "primarily" of "statewide concern").

robust judicial protection of home rule.<sup>11</sup>

Because the state interest in preemption of regulatory matters is so clearly established, its preemption of local minimum wage ordinances in 2005 and of local paid sick leave ordinances in 2011 did not even prompt the preempted cities to sue.<sup>12</sup>

## COUNTIES

The Wisconsin constitution does not grant home rule authority to counties or towns (as opposed to cities and villages), although the legislature has provided counties power over organizational and administrative matters.<sup>13</sup> County acts must not “conflict with the state’s interest in uniformly treating those questions that arise in many counties across the state.”<sup>14</sup> If a county enactment meets any of the following factors, it is without legal effect: (1) the legislature has expressly withdrawn power; (2) the county ordinance logically conflicts with state legislation; (3) the ordinance defeats the purpose of state legislation; or (4) the ordinance “goes against the spirit of state legislation.”<sup>15</sup>

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<sup>11</sup> *Black*, 882 N.W.2d at 364 (Ann Walsh Bradley, J., concurring and dissenting) (arguing that the majority opinion turns the Home Rule Amendment’s “purpose on its head”) (“Instead of freeing municipalities from interference by the state legislature when dealing with local affairs, the majority limits the power and restrains the ability of municipalities to self-govern.”); *supra* note 2 (citing Justice Rebecca Bradley’s concurrence); *Madison Teachers, Inc.*, 851 N.W.2d at 395 (Ann Walsh Bradley, J., dissenting) (“The majority’s result substantially strips municipalities of their right to self-govern as granted by the Home Rule Amendment . . .”).

<sup>12</sup> *See* 2011 Wisconsin Act 16 (amending Wis. Stat. § 103.10 to occupy the field of family and medical leave to the exclusion of local regulation); Daniel Ritsche, Wis. Leg. Reference Bureau, *The Minimum Wage in Wisconsin*, Leg. Report 15-3, at 1 (December 2015) *available at* [https://docs.legis.wisconsin.gov/misc/lrb/legislative\\_reports/lrb\\_legislative\\_report\\_15\\_3.pdf](https://docs.legis.wisconsin.gov/misc/lrb/legislative_reports/lrb_legislative_report_15_3.pdf) (discussing the state legislature’s preemption of Madison’s “living wage ordinance”) (citing 2005 Wisconsin Act 12 (codified at Wis. STAT. § 104.001(2017) (declaring minimum wage statewide concern and occupying field to exclusion of local regulation)).

<sup>13</sup> Wis. STAT. § 59.03 (2017); *see Jackson County v. State Dep’t of Natural Res.*, 717 N.W.2d 713, 720 (Wis. 2006) (“[C]ounties exist for, and derive their powers from the state through legislation”).

<sup>14</sup> *Id.* at 519.

<sup>15</sup> *Id.* at 513.