



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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August 22, 2011

Mr. David A. Stella
Secretary
Department of Employee Trust Funds
801 W. Badger Rd.
P.O. Box 7931
Madison, WI 53701-7931

Re: Request for advice regarding application of section 9115 of 2011
Wisconsin Act 13

Dear Secretary Stella:

You have requested an opinion regarding whether section 9115 of Wisconsin Act 13, requiring an allocation of monies from the public employee trust fund, would constitute a taking of property in violation of the Wisconsin and U.S. Constitutions. I conclude that, as long as the allocation is made consistently with Wis. Stat. § 40.03(6)(e), it would not.

Section 9115 of 2011 Wisconsin Act 13 provides in relevant part:

[F]rom reserve accounts established under section 20.515(1)(r) of the statutes for group health insurance and pharmacy benefits for state employees, the secretary of employee trust funds shall allocate an amount equal to \$28,000,000 to reduce employer costs for providing group health insurance for state employees for the period beginning on July 1, 2011, and ending on December 31, 2011.

You ask whether the non-statutory provision requires that all \$28 million of the allocation be used to directly offset employer costs on a dollar-for-dollar basis. The statute does not specifically so require and should not be so interpreted.

The Group Insurance Board is authorized to establish and apportion health insurance and pharmacy benefit reserves. Wis. Stat. § 40.03(6)(d). Those reserves consist of health insurance premiums paid by employees, employers, and annuitants and are part of the trust fund. Wisconsin Stat. § 40.03(6)(e) provides the exclusive mechanism for the treatment of such reserves, requiring that they shall be used to “reduce premium payments in following contract years or to establish reserves to stabilize costs in subsequent years.” Apportionment may be

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made to specific groups of employers or employees based only on favorable experience. Wis. Stat. § 40.03(6)(e).

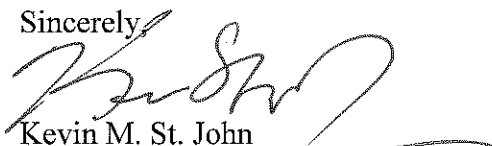
Section 9115 requires the apportionment of \$28 million from the reserve accounts “to reduce employer costs.” The question is whether section 9115 requires the entirety of the apportionment to be made in favor of employers. On its face, the statute requires no dollar-for-dollar offset in favor of employers. An apportionment resulting in across-the-board premium reductions, as provided for in Wis. Stat. § 40.03(6)(e), would “reduce employer costs” by decreasing the amount owed by employers toward employee health insurance premiums.

Reading section 9115 as providing reductions that benefit only employers would be inconsistent with Wis. Stat. § 40.03(6)(e), which permits no apportionment limited to a specific group absent a finding of favorable experience. That inconsistency, in turn, would create a potential taking of the accrued rights of Wisconsin Retirement System participants under the Wisconsin and U.S. Constitutions.

Participants in the Wisconsin Retirement System have certain property rights in that fund. Under Wis. Stat. § 40.19, participants are protected from the abrogation of accrued benefits unless the benefits are replaced by benefits of equal or great value. Wis. Stat. § 40.19; *Wis. Prof'l Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, ¶ 111, 243 Wis. 2d 512, 627 N.W.2d 807. With respect to amounts currently held in the reserve accounts, participants have an accrued right to have those amounts apportioned consistently with Wis. Stat. § 40.03(6)(e): either for across-the-board premium reductions, or held in reserve in order to stabilize costs in future years.

We should construe statutes so as to avoid constitutional infirmities. *Paulhe v. Riley*, 2006 WI App 171, ¶ 23, 295 Wis. 2d 541, 722 N.W.2d 155. Statutes involving the same subject matter must be construed in a manner that harmonizes them. *State v. Schaefer*, 2008 WI 25, ¶ 55, 308 Wis. 2d 279, 746 N.W.2d 457. In light of those canons, I read section 9115 as requiring the Secretary to apportion \$28 million from the reserve accounts consistently with Wis. Stat. § 40.03(6)(e). This result will satisfy the Secretary's obligation under section 9115 to “reduce employer costs” while still protecting the accrued rights of participants in the Wisconsin Retirement System.

Sincerely,



Kevin M. St. John
Deputy Attorney General

CG:bk