



State of Wisconsin
Department of Employee Trust Funds
Robert J. Conlin
SECRETARY

801 W Badger Road
PO Box 7931
Madison WI 53707-7931

1-877-533-5020 (toll free)
Fax 608-267-4549
etf.wi.gov

Correspondence Memorandum

Date: April 12, 2017
To: Robert J. Conlin, Secretary
From: David H. Nispel, General Counsel
Diana M. Felsmann, Attorney
Subject: Self-Insured Health Insurance Benefits and Local Employers

Question Presented: Does Wisconsin Attorney General (A.G.) Opinion, 76 OAG 311, (1987) prohibit the State of Wisconsin's Group Insurance Board (GIB) from establishing a self-insured group health insurance program for local governmental employers that elect to offer that coverage to their employees through the Wisconsin Public Employer (WPE) program?

Answer: No. GIB authority to establish a self-funded health insurance program for local governmental employees whose employers choose to participate in the WPE program is found in the plain language of Chapter 40 of the Wisconsin Statutes. Specifically, Wis. Stat. §40.03(6)(a)2. states that the GIB may provide any group insurance plan on a self-insured basis for insured employees. "Insured employee" is defined in state law to include eligible employees based on a local governmental employer's participation in the WPE program. Wis. Stat. §§40.02(39) & 40.02(25)(b)9.

With respect to the 1987 A.G. opinion requested by the Office of the Commissioner of Insurance, its analysis was incomplete in concluding: (1) the language in Wis. Stat. §40.03(6)(a)2. limits the GIB to providing a group insurance plan on a self-insured basis on behalf of the state, and the state does not include municipal employers; and (2) that such an interpretation avoids creating the potential issue of the state taking on the obligation of paying the debt of another, which would be prohibited by article VIII, section 3 of the Wisconsin Constitution.

Regarding a potential constitutional issue, the opinion did not conclude that establishing a self-funded plan as an option to local governmental employers was unconstitutional. It only identified the issue. Based on how the Wisconsin Supreme Court has previously defined the word "debt," it appears establishing such a plan would not, in fact, raise such a concern. In particular, the Court defined the word debt for purposes of article VIII, section 3 to mean the state taking on absolute obligations to pay money or its equivalent.¹

Under the current fully-insured model, the Department of Employee Trust Funds (ETF) maintains separate health insurance reserve accounts for state employees and local governmental employees.² Under a self-insured model, those two separate reserves, one for state employees and one for local governmental employees, would continue.³ The WPE self-funded reserve would

¹ *State ex rel. Warren v. Nusbaum*, 59 Wis.2d 391, 427, 208 N.W.2d 780, 802 (1973).

² Wis. Stat. §40.04(9).

³ Wisconsin Legislative Council memo *Brief Description of Selected Differences in Providing Health Care Coverage for State Employees Under a Self-Insured Structure Versus an Insured Structure*, dated March 24, 2017, page 6, suggests a constitutionality issue may possibly be avoided by maintaining a separate reserve for the WPE program. ETF already

be a continuation of the already existing fully-insured reserve. Under a self-funded model, that reserve would continue to receive contributions via ongoing employer and employee premiums. As in all self-insured plans, if claims experience outpaced the continued build-up of funds in the reserve, adjusting premiums would be one of a number of considerations.⁴ Based on these protections, the state would not be taking on an absolute obligation to pay money or its equivalent for a WPE self-insured plan.

Also, it is significant to note that the GIB already provides self-insured coverage to local governmental employees through the Its Your Choice Access Health Plan and State Maintenance Plan, a pharmacy benefit program, and the uniform dental benefit program.

In addition to failing to fully analyze the plain language of Chapter 40, Wisconsin Supreme Court precedent, and note that the local employer plan is separately funded, the 1987 opinion did not distinguish between the statutory language related to the GIB authority to establish fully-insured plans and the GIB authority to establish a self-insured plan. Both reference the GIB as “acting on behalf of the state.” While the A.G. opinion uses that language to support its conclusion that the GIB cannot establish a self-insured plan for local governmental employers, the opinion does not address how that same language does not restrict the GIB from establishing fully-insured plans for local governmental employers as well.⁵

ANALYSIS

I. BACKGROUND

ETF is governed by Chapter 40 of the Wisconsin Statutes. GIB authority is established in that chapter. Regarding statutory language specific to the GIB’s authority to provide a self-insured group health plan for state employees and eligible employees of local governmental employers, applicable statutes include: (1) Wis. Stat. §40.03(6)(a); (2) Wis. Stat. §40.02(39); (3) Wis. Stat. §40.02(25)(b)9.; and (4) Wis. Stat. §40.51(7)(a).

Wis. Stat. §40.03(6)(a) provides the following:

(6) GROUP INSURANCE BOARD. The group insurance board:

- (a) **1.** Shall, on behalf of the state, enter into a contract or contracts with one or more insurers authorized to transact insurance business in this state for the purpose of providing the group insurance plans provided for by this chapter; or
- 2.** May, wholly or partially in lieu of subd. 1., on behalf of the state, provide any group insurance plan on a self-insured basis in which case the group insurance board shall approve a written description setting forth the terms and conditions of the plan, and may contract directly with providers of hospital, medical or ancillary services to provide insured employees with the benefits provided under this chapter.

The above-referenced language authorizes the GIB to provide a group insurance plan on a self-insured basis for insured employees. Wis. Stat. §40.02(39) defines “insured employee” as “any

maintains separate reserves for state employee coverage and local governmental employee coverage, and would continue that practice under a self-insured model. http://www.thewheelerreport.com/wheeler_docs/files/0328legcouncilerpenbach.pdf?_sm_au_=iVVSHWHM6S16N5MH, visited April 9, 2017.

⁴ When a local governmental employer resolves to offer health insurance coverage through WPE, that employer agrees to abide by the terms of the program as set forth in the contract between the GIB and health insurance providers, and further agrees “to take all actions and make salary deductions for premiums and submit payments required by the Board to provide such Group Health Insurance.” <http://etf.wi.gov/publications/et1324.pdf>, visited April 11, 2017.

⁵ As noted in the March 24, 2017 Wisconsin Legislative Council memo, page 6, footnote 5.

eligible employee who is properly enrolled in the benefit plan.” The definition of “eligible employee” in Wis. Stat. §40.02(25)(b)9. includes “any other employee of any employer, other than the state, that has acted under s. 40.51 to make such coverage available to its employees.”

Regarding an employer electing to be included under the WPE program, Wis. Stat. §40.51(7)(a) provides in pertinent part: “Any employer, other than the state, including an employer that is not a participating employer, may offer to all of its employees a health care coverage plan through a program offered by the group insurance board.”

A. Current Group Health Insurance Coverage for State Employees and Local Governmental Employees

For plan year 2017, the GIB provides and ETF administers the State of Wisconsin Group Health Insurance Program (GHIP) for state employees and the WPE program for local government employees. There are 368 local government employers offering health benefits to employees through the WPE program.

The GHIP and WPE programs are primarily fully-insured health plans. However, the GIB already provides (and ETF already manages) three self-insured benefit programs: (1) the IYC Access Health Plan and State Maintenance Plan; (2) the pharmacy benefit program; and (3) the uniform dental benefit program.

ETF currently maintains separate reserve accounts for GHIP and WPE.

B. Group Health Insurance Coverage for State Employees and Local Governmental Employees on an Overall Self-Insured Basis

On February 8, 2017, the GIB approved a new self-insured/regional program structure for the GHIP and WPE for 2018. This would be in addition to the programs already offered on a self-insured basis, and would replace the fully-insured plans now offered under GHIP and WPE. ETF would continue to maintain separate reserve accounts for each plan.

II. ANALYSIS OF THE 1987 ATTORNEY GENERAL OPINION

In 1987, the State of Wisconsin’s Attorney General’s Office issued an opinion in response to questions posed by then Commissioner of Insurance, Robert Haase. The questions posed were:

1. Does section 632.895(5m), Stats., apply to group health insurance contracts between health maintenance organizations and the GIB?
2. May the GIB establish a pool of municipal employers under section 40.51(7) to provide health care benefits on a self-funded basis?

The majority of the opinion focused on the first question regarding disability insurance policies and dependents. The first question is unrelated to the GIB’s authority to establish a self-insured plan. The analysis on the self-insured question was limited to two paragraphs, and concluded the following:

- The language in 40.03(6)(a)2. limits the GIB to providing a group insurance plan on a self-insured basis on behalf of the state, and the state does not include municipal employers.

- The above interpretation avoids creating the potential issue of the state taking on the obligation of paying the debt of another, which would be prohibited by article VIII, section 3 of the Wisconsin Constitution.

A. The Analysis of GIB Authority to Establish a Self-Insured Plan for Local Governmental Employees Was Incomplete

The analysis contained in the A.G. opinion was incomplete because it did not reference the plain language of Wis. Stat. §§40.03(6)(a)2., 40.02(39) & 40.02(25)(b)9. When read together, those statutory sections lead to the conclusion that local governmental employees are eligible for self-insured group health insurance coverage through WPE.

In particular, Wis. Stat. §40.03(6)(a)2. states that the GIB may provide any group insurance plan on a self-insured basis for insured employees. “Insured employees” is defined in state law to include employees eligible based on a local governmental employer’s participation in the WPE program. Wis. Stat. §§40.02(39) & 40.02(25)(b)9.

In addition, the opinion did not distinguish between Wis. Stat. §40.03(6)(a)2. related to self-insured plans and Wis. Stat. §40.03(6)(a)1. related to fully insured plans. Both of those statutory subsections provide that GIB is acting “on behalf of the state,” yet the A.G. opinion does not question the GIB’s authority to provide a fully-insured plan for local governmental employees.

Further, neither of the cases cited in the 1987 opinion offer direct insight into the GIB’s authority to establish a self-insured health insurance plan for local governmental employees. The issue in *Madison v. Hyland, Hall & Co.*, 73 Wis.2d 364 (1976), was whether the city and county were “persons” within the meaning of the Antitrust Act and thus entitled to seek treble damages in the case. The court concluded they were. The issue in *Bleck v. Monona Village*, 34 Wis.2d 191 (1967) was the extent to which the village was required to follow state law in transforming from a village to a fourth class city.

B. Question of Constitutionality

The 1987 A.G. opinion did not conclude that establishing a self-funded plan offered as an option to local governmental employers was unconstitutional. Rather, that opinion remarked on the potential issue of the state taking on the obligation of paying the debt of another, which would be prohibited by article VIII, section 3 of the Wisconsin Constitution.

Article VIII, section 3 of the Wisconsin Constitution states:

Credit of state. SECTION 3. Except as provided in s. 7 (2) (a), the credit of the state shall never be given, or loaned, in aid of any individual, association or corporation.⁶

The Wisconsin Supreme Court in *State ex rel. Hammermill Paper Co. v. LaPlante*, 58 Wis.2d 32, 205 N.W.2d 784 (1973) discussed the burden a party carries when challenging the constitutionality of legislative acts:

Unconstitutionality of the act must be demonstrated beyond a reasonable doubt. Every presumption must be indulged to sustain the law if at all

⁶ The Constitution annotated does not cite to any cases interpreting section 3 immediately below that section. <https://docs.legis.wisconsin.gov/constitution/wi/000233/000004>, visited April 9, 2017.

possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality.

Id. at 58 Wis.2d 45-47, 205 N.W.2d 792-793.

In this case, Chapter 40 provides that local governmental employers may elect to participate in a self-insured plan established by the GIB. The standard to be met if challenged on constitutionality grounds would appear to be proving beyond a reasonable doubt that the establishment of a self-insured plan for local governmental employers violated article VIII, section 3 of the Wisconsin Constitution.

Further, in *State ex rel. Warren v. Nusbaum*, 59 Wis.2d 391, 208 N.W.2d 780 (1973), the Wisconsin Supreme Court defined the word “debt” as used in article VIII, section 3 to mean: “The word ‘debt’ as used in the constitution, means all absolute obligations to pay money or its equivalent.” *Id.* at 427, 802.

No absolute obligation on behalf of the state is created when the GIB establishes self-insured programs offered as an option to local governmental employers. ETF has and would continue to have a separate reserve account for paying health insurance claims. That reserve, which already exists as the local employer reserve under the current fully-insured model, would continue to receive contributions through employer and employee premiums. If claims experience were to outpace the build-up of funds in the reserve, among the options would be to adjust premiums. When a local employer resolves to participate in the WPE program, that employer is required to “abide by the terms of the program as set forth in the contract between the GIB and health insurance providers,” and “to take all actions and make salary deductions for premiums and submit payments required by the Board to provide such Group Health Insurance.”⁷ As a result, if the GIB established a self-funded plan as an option for local employers, it would not appear to create debt in the form of an absolute obligation on behalf of the state.

A Wisconsin Legislative Council memorandum issued on March 24, 2017, seems to concur.⁸ On page 6 of that memo, the Legislative Council suggested a resolution to the potential constitutional issue, offering that it may possibly be resolved under a self-insured model by keeping the reserve account for the WPE program separate from the reserve for state employees. As noted above, ETF already maintains two separate reserves, one for state employee coverage and one for local governmental employee coverage, and would continue that practice under a self-insured model.

III. Conclusion

In our opinion, the GIB has the authority pursuant to the plain language of Chapter 40 of the Wisconsin Statutes to provide eligible employees with health insurance coverage under a self-insured group health insurance program. As set forth above, it is the choice of local government employers to make available to their employees the health benefit plans offered by the GIB. The local employer makes the employer premium contribution and the employee makes the employee contribution. Currently, there are separate reserve accounts for state employees and for local employees. Those separate reserves would continue to exist under a self-insured model.

⁷ <http://etf.wi.gov/publications/et1324.pdf>, visited April 9, 2017.

⁸ *Brief Description of Selected Differences in Providing Health Care Coverage for State Employees Under a Self-Insured Structure Versus an Insured Structure*
http://www.thewheelerreport.com/wheeler_docs/files/0328legcouncilerpenbach.pdf, visited April 9, 2017.

Further, the GIB has already established self-insured plans for local employers via the Its Your Choice Access Health Plan and the State Maintenance Plan, and through the uniform dental benefits and pharmacy benefits programs.

Attorney General Opinion 76 OAG 311, (1987) is not a barrier because its analysis under Chapter 40 was incomplete. Also, its remark on a potential constitutional issue was unexplored, and did not reference then-existing Wisconsin Supreme Court precedent interpreting article VIII, section 3. Nor did it recognize how ETF separately funds accounts for the state employee and local employee plans now, and would continue to do so under a self-insured model.

Moreover, the same language that the opinion interpreted as preventing the GIB from establishing a self-insured plan for local employers, “that the GIB acts “on behalf of the state,” is also present in the statutory language referencing fully-insured plans. Wis. Stat. §40.03(6)(a)1. & 2.