MEMORANDUM

Date: March 20, 2017

To: Senator Scott Fitzgerald, Senate Majority Leader
Representative Robin Vos, Assembly Speaker
Senator Alberta Darling, Co-Chair Joint Committee on Finance
Representative John Nygren, Co-Chair Joint Committee on Finance

From: Eric M. McLeod
Husch Blackwell LLP

Re: Prohibition on Non-State Employee Participation in a Self-Insured Health Plan Created by the State.

Husch Blackwell LLP has been retained by WEA Trust to evaluate the constitutionality of non-state employee participation in a self-insured health plan created by the State of Wisconsin. This memorandum sets forth our analysis on this issue and, in particular, addresses the legal support for a prior Wisconsin Attorney General Opinion, 76 Op. Att'y Gen. 311 (1987), in which Attorney General Donald J. Hanaway concluded that the State of Wisconsin is prohibited from offering self-insured health plans to the employees of political subdivisions of the state.

The Attorney General's conclusion is based on Article VIII, Section 3 of the Wisconsin Constitution, which prohibits the creation of an obligation on the part of the state to pay the debt of another. Because municipal employers are not "the state," the Attorney General concluded that allowing non-state, municipal employees to participate in a self-insured health plan offered by the state would create an unconstitutional state obligation to pay the debt of another. Based

on a review of applicable legal authority, the Attorney General's opinion is well grounded. A discussion of that legal authority follows.

A. Municipal Employers Are Not "The State."

The Attorney General concluded that municipal employers are not "the state." 76 Op. Att'y Gen. 311, 315 (1987). In support of this proposition, the Attorney General cites *Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 243 N.W.2d 422, *appeal dismissed*, 429 U.S. 933 (1976). In *Hyland*, the Wisconsin Supreme Court found that cities and counties are distinguishable from the state because they are not sovereign, but rather are municipal corporations. *See Hyland*, 73 Wis. 2d at 372, 243 N.W.2d at 427.

Additional case law further supports the Attorney General's conclusion that municipalities are not "the state." *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1, involved an action by state employees against the Department of Employee Trust Funds, Employee Trust Funds Board, Group Insurance Board, and Secretary of Department of Employee Trust Funds, challenging the constitutionality of certain state employee trust fund statutes. The Wisconsin Supreme Court affirmed the denial of a motion to intervene brought by a group of Wisconsin municipalities on grounds that state employees are separate and distinct from municipal employees. Furthermore, in *Thompson v. Rock Cty.*, 648 F. Supp. 861 (W.D. Wis. 1986), the United States District Court for the Western District of Wisconsin recognized the legal distinction between state employees and municipal employees in determining that Wisconsin court commissioners are state officers and not county officers. The United States Supreme Court has also distinguished a state from its political subdivisions. *See*

Cmty. Commc'ns Co. v. City of Boulder, Colo., 455 U.S. 40, 53–54, 102 S. Ct. 835, 842 (1982) (finding that because municipalities are not states, and therefore not sovereigns, the notions of federalism are not involved when federal law is applied to invalidate municipal legislation.)

These cases all provide additional support for the Attorney General's opinion that municipal employers are not "the state."

B. Article VIII, Section 3 of the Wisconsin Constitution

Article VIII, Section 3 of the Wisconsin Constitution provides that "the credit of the state shall never be given, or loaned, in aid of any individual, association or corporation." Wis. Const. art. VIII, § 3. The case law discussing this provision sets forth a standard of a "legally enforceable obligation." *See State ex rel. Wisconsin Dev. Auth. v. Dammann*, 228 Wis. 147, 280 N.W. 698 (1938). The Wisconsin Supreme Court established this standard in *State ex rel. Wisconsin Dev. Auth. v. Dammann*, in which it evaluated an act involving powers of the Wisconsin Development Authority. In response to the contention that the act loans the credit of the state in violation of Article VIII, Section 3, the Court found:

> It is our conclusion that the giving or loaning of the credit of the state which it was intended to prohibit by sec. 3, Art. 8, constitution, occurs only when such giving or loaning results in the creation by the state of a legally enforceable obligation on its part to pay to one party an obligation incurred or to be incurred in favor of that party by another party. There is no such giving or loaning of the state's credit within the meaning of that prohibitory provision when all that is done by the state is to incur liability directly or only to such other party as, for example, where the state lawfully employs someone to perform an authorized service for the state.

Dammann, 228 Wis. 147, 280 N.W. 698, 715 (underline added). Therefore, an arrangement in which the state is obligated to pay to one party an obligation incurred in favor of that party by a third party is unconstitutional under Article VIII, Section 3. The "legally enforceable obligation" standard has been affirmed and adopted in several cases. *See, e.g.*, *State ex rel. La Follette v. Reuter*, 36 Wis. 2d 96, 153 N.W.2d 49 (1967); *Glendale Dev., Inc. v. Bd. of Regents of Univ. of Wis.*, 12 Wis. 2d 120, 106 N.W.2d 430 (1960).

As discussed above, municipal employers are not "the state." Thus, municipal employees' participation in the self-insured plan would obligate the state to pay health care providers for an obligation incurred in favor of those providers by another party—the non-state, municipal employees. Therefore, according to the standard outlined in *Dammann*, participation by non-state employees in a state self-insured health plan would create a "legally enforceable obligation" in violation of Article VIII, Section 3. The state can provide self-insured health plans to its own state employees, but may not create an unconstitutional obligation to pay the debt of another by also providing the plan to non-state, municipal employees.