



## OFFICE OF CORPORATION COUNSEL

---

*Client-Driven. Community-Focused.*

MARGARET C. DAUN  
Corporation Counsel

SCOTT F. BROWN  
KAREN L. TIDWALL  
Deputy Corporation Counsel

ALAN M. POLAN  
KATHRYN M. WEST  
DALE R. NIKOLAY  
DAVID N. FARWELL  
LISA M. PROCACCIO  
NELSON W. PHILLIPS III  
MELINDA S. LAWRENCE  
JUDD H. TABACK  
CHRISTOPHER L. MORGAN  
WILLIAM G. DAVIDSON  
RACHEL L. EBERT  
Assistant Corporation Counsel

DATE: June 1, 2023

TO: Interested Parties

FROM: Margaret C. Daun, Corporation Counsel  
Karen L. Tidwall, Deputy Corporation Counsel  
Scott F. Brown, Deputy Corporation Counsel  
Lisa M. Procaccio, Assistant Corporation Counsel

SUBJECT: Resolution File No. 23-404

---

On May 25, 2023, the County Board (“Board”) referred Resolution File No. 23-404 (“File”) to the Office of Corporation Counsel (“OCC”) to examine its legality. Introduced by Supervisors Clancy and Martinez, it provides out-of-state travel expense reimbursement to County employees for abortion services funded through a \$30,000 contingency appropriation.

If such a program were legally challenged, it is the opinion of the OCC that Milwaukee County (“County”) would be nearly certain to lose based on a plain, common sense reading of the Wisconsin statutes that prohibit government funding of abortion and any program that promotes abortion. Wis. Stat. §§ 59.53, 20.9275.

If the County determines that funding and operation of an out-of-state medical travel expense reimbursement program is feasible, to significantly reduce legal risk, the OCC recommends that such reimbursements be provided for any medical procedure, instead of exclusively limiting the policy to abortion-related travel only.

### **Legal Analysis**

Wisconsin statute section 20.9275(2) prohibits Milwaukee County from funding any “pregnancy program, project or service ... [that] promotes, encourages or counsels in favor of abortion services.” See Wis. Stat. § 20.9275(2).<sup>1</sup> As noted above, the policy proposed in the File would reimburse travel expenses incurred by County employees if they travel out-of-state for an abortion, but not for any other medical needs. Therefore, this policy would be most reasonably

---

<sup>1</sup> Wis. Stat. § 59.53(13) prohibits counties from “funding [] a pregnancy program, project, or service if s. 20.9275(2) applies to the pregnancy program, project, or service.”

understood to provide an additional benefit only to employees that obtain abortions, which in turn can reasonably be argued to constitute a program that “promotes, encourages, or counsels in favor of abortion services” since no other medical procedure would trigger the availability of the benefit. Accordingly, a court would nearly certainly conclude that the proposed reimbursement policy violates Wisconsin statute § 20.9275(2). While it could be argued that providing travel expense reimbursement does not “promote[], encourage[], or counsel[] in favor of” abortion, the OCC advises that it is nearly certain that a court would reject such a reading because it does not comport with longstanding rules of statutory interpretation.

It is a longstanding and well-known canon of statutory construction that when interpreting statutes, courts are to give legislation its plain meaning when clear, reading the legislation as a whole and the particular language in context. *Teschendorf v. State Farm, Inc.*, 293 Wis. 2d 123, 134 (2006) (citing *State ex rel. Kalal v. Circuit Court*, 271 Wis. 2d 633 (2004); *Landis v. Physicians Ins. Co., Inc.*, 245 Wis. 2d 1 (2001)). And “statutory interpretation [must] discern and give effect to the intent of the legislature.” *Teschendorf*, 293 Wis. 2d at 133 (citing *State v. Morford*, 268 Wis.2d 300 (2004)). Finally and importantly, the County is prohibited from enacting an ordinance that logically conflicts with state legislation, defeats the purpose of the state legislation, or goes against the spirit of the state legislation. *See Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234, 238 (1984) (citing to Wis. Stat. § 62.11(5); *Fox v. Racine*, 225 Wis. 542, 546–47, 275 N.W. 513; *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 530, 253 N.W.2d 505).

The interpretation and application of section 20.9275(2) must adhere to these principles. And so, the question is whether a benefit policy that provides out-of-state medical travel reimbursement *only* for abortions “promotes, encourages, or counsels in favor of” abortion. Webster’s Unabridged Dictionary (2d ed. 2001) defines “promote,” “encourage,” and “in favor of” as follows:

- Promote: “to help or encourage to exist or flourish ... to encourage the ... acceptance [] of (a product[or service]) ... to move forward, advance,” *id.* at 1548;
- Encourage: “to stimulate by assistance, approval, etc. ... to promote, advance, or foster,” *id.* at 640;
- In favor of: “on the side of,” *id.* at 703.

Because the policy would provide a unique financial benefit to County employees *only* for abortions to the exclusion of all other medical procedures, it cannot be reasonably argued that such a policy does not “promote[], encourage[], or counsel[] in favor of” abortion. *See Teschendorf*, 293 Wis. 2d at 134. Furthermore, while the language of section 20.9275 is quite plain, even if a court felt compelled to examine the relevant statutes as a whole and in context, it would nearly certainly conclude that the legislature intended to prohibit not only direct government spending on abortion procedures themselves, but also spending that helps or assists employees in obtaining abortions—precisely the effect of the policy proposed in the File.

### **Legal Challenge Could Be Filed Immediately**

Alarming, it would be possible for a legal challenge to this policy to be filed *before implementation directly with the Wisconsin Supreme Court*, instead of a trial court, the far more usual approach, *see* Wis. Const. Art. VII, § 8 (circuit courts in Wisconsin are constitutional trial courts with general original subject matter jurisdiction over “all matters civil and criminal”). The Wisconsin Supreme Court will accept an original action in “exceptional cases in which a judgment by the court significantly affects the community at large.” *Wis. Prof’l Police Ass’n, Inc. v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 529, 627 N.W.2d 807, 816. Given the polarized political climate particularly as it relates to abortion and that the Court’s proportion of conservative-leaning justices, inclined to view abortion skeptically as evidenced by the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Org*, No. 19-1392, 597 U.S. \_\_\_\_ (2022), 2022 WL 2276808, to liberal-leaning justices is about to swing from a 4:3 conservative majority to a 3:4 liberal majority once Judge Janet Protasiewicz takes her seat on the Court in August, it is possible that the conservative majority on the Court would be highly motivated to decide a challenge brought to block the County’s implementation of this policy if adopted prior to August. While the policy as proposed in the File would apply only to County employees, it could be looked to as precedent-setting for all 72 counties in Wisconsin, especially given that Dane County implemented a policy adopted in its 2023 budget that largely mirrors the County’s proposal.

### **A Likely Legal Approach to Medical Travel Reimbursement**

The above legal analysis turns upon the reimbursement policy’s availability exclusively for abortion-related out-of-state travel. If a proposed policy provided travel expense reimbursement for *any* out-of-state medical procedure, and if in its implementation employees were not required to specify what sort of medical care they were seeking out-of-state (as is appropriate to preserve employee’s health privacy rights), the OCC advises that it would be likely to withstand a legal challenge, especially if the policy was not adopted or implemented until after Judge Protasiewicz takes her seat on the Wisconsin Supreme Court in August. While the practical impact of a generally available out-of-state medical travel reimbursement policy could be that it may assist employees who obtain abortions, it would be impossible to prove that even one County employee used the benefit to do so since employees would not identify what specific medical care they received out-of-state. Accordingly, it would run counter to the plain language of a facially-neutral policy and fly in the face of common sense to argue that medical travel reimbursement—available for any out-of-state medical care—somehow “promotes, encourages, or counsels in favor of abortion services” if it can never be definitively shown that any employee actually used the policy for that purpose.

We note that there could be some argument that this approach, coming on the heels of the original abortion-specific proposal, runs contrary to the spirit of statute sections 59.53 and 20.9275 simply because of the possibility noted above and because it may appeal to some members of the Board as a less risky alternative to the current proposal. Regardless, without the specific language tying the benefit exclusively to abortion, a court is unlikely to conclude that the policy violates either the plain meaning or legislative intent of the relevant statutes.

In conclusion, it is the OCC's opinion that should the County decide that it is operationally and fiscally feasible to generally provide out-of-state medical travel reimbursement for its employees,<sup>2</sup> such a benefit would be likely to withstand a legal challenge based on the aforementioned statutes, though some minimal risk would remain (especially if the below recommendations are disregarded).

Importantly, if Supervisors elect to pursue this approach, the OCC strongly recommends the following:

- File No. 23-404 should be rejected by the Personnel and Finance Committees, as well as the Board, before introduction of any other medical travel reimbursement policy;
- any new policy should be put forward in an entirely new resolution;
- any new legislation should not mention abortion and should avoid any language explicitly linking it to File No. 23-404; and
- any new policy should not be introduced until the September cycle, after Justice Protasiewicz has taken her seat on the Wisconsin Supreme Court.

\*\*\*

---

<sup>2</sup> The implementation of this policy and its operational detail would be important. For example, the County would need to determine what documentation will be required regarding travel, what documentation (if any) will be required regarding the medical procedure itself (taking care not to require the employee to waive their health privacy rights), whether the reimbursement is available for only procedures or more broadly (e.g., surgeries, consultations, treatments), whether it is available for alternative or homeopathic medical procedures, the submittal and payment process (before or after the procedure or both), the maximum reimbursable amount, distance limitations (if any), and prioritization of reimbursement requests if there is limited funding (i.e., first come, first served or some other approach). To preserve employee health privacy rights, the OCC recommends that one potential solution could be to ask an employee to formally aver that their out-of-state medical procedure meets the policy's requirements for reimbursement, however those are specified.