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DATE: May 23, 2022

TO: Interested Stakeholders

FROM: Margaret M. Daun, Milwaukee County Corporation Counsel  
Scott F. Brown, Deputy Corporation Counsel  
Karen L. Tidwall, Deputy Corporation Counsel

SUBJECT: The County Executive's and Board of Supervisors' respective non-emergency powers and duties relative to COVID-19 mitigation directives (File No. 22-419)

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**Question Presented:** Does the County Executive (“Executive”)<sup>1</sup> have the power to implement COVID-19 mitigation-related health and safety work rules and building directives (hereinafter collectively, “Directives” or “COVID-19 Directives”), administered and managed by his administration, without the approval of the Milwaukee County Board of Supervisors (the “Board”), or alternatively, does the Board have the power to review, amend, terminate, or approve any such Directives, after the termination of the COVID-19 Proclamation of Emergency and related Administrative Orders on April 1, 2022<sup>2</sup>?

**Brief Answer:** Whether a particular rule, action, or directive by the Executive, including the COVID-19 Directives, must be approved by the Board depends on what rule, action, or directive is in question, but generally, state law grants extremely broad and unfettered authority to the County Executive to operate and maintain all County property and to manage the County workforce.

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<sup>1</sup> The Office of the Milwaukee County Executive may be referred to herein as the “CEX” and Milwaukee County Executive David Crowley may be referred to as the “Executive.” However, unless clear from the context that a distinction is being drawn between the CEX and the Executive, the terms are used interchangeably and these terms also include the entirety of the Executive’s administration (*i.e.*, all departments and acts by department heads). The Milwaukee County Board of Supervisors is collectively referred to as the “Board.” A generic board of supervisors or county executive may be referred to as “county board(s)” and “executive.”

<sup>2</sup> The current COVID-19 mitigation rules are not based upon (and have nothing to do with) the Executive’s emergency powers. The Board indisputably possesses the power to review, cancel, amend, terminate, extend, etc. any emergency declaration or orders issued pursuant thereto. The Office of Corporation Counsel’s analysis of emergency powers may also be accessed via Legistar in File Nos. 20-290 and 21-961.

## I. Request for OCC Opinion.<sup>3</sup>

During the March 10, 2022, Judiciary Committee discussion of File No. 22-419 (*see* [https://milwaukeecounty.granicus.com/player/clip/2714?view\\_id=2&meta\\_id=531330&redirect=true](https://milwaukeecounty.granicus.com/player/clip/2714?view_id=2&meta_id=531330&redirect=true)), the Office of Corporation Counsel (“OCC”) was asked to address the question above, among other related questions received informally from various clients including:

- What is the status of the work rules and facility rules issued (or purported to continue to remain in place) by the Executive after April 1, 2022?
- Does the Executive continue to issue work and facility rules under his emergency powers or another source of authority?
- What are the Board’s options considering the Executive’s veto of File No. 22-419?
- What are the Executive’s options in response to a potential veto override?

The OCC has previously addressed the specific questions above and questions regarding the relative powers of the Executive and Board, a sampling of which are listed below:

- May 9, 2022: Oral opinions offered during the Judiciary Committee meeting;<sup>3</sup>
- May 6, 2022: Informal opinion emailed to all Supervisors (Ex. 1, (without exhibits));<sup>3</sup>
- March 24, 2022: Oral opinions offered at the full Board meeting;<sup>3</sup>
- March 10, 2022: Oral opinions offered during the Judiciary Committee meeting;<sup>4</sup>
- September 22, 2021: Formal written opinion regarding the emergency powers (*see* File No. 20-290);<sup>5</sup>

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<sup>3</sup> The OCC’s statutory duties include “(2) ... advis[ing] the board, county park commission, county department ... and other departments, boards, commissions, committees, agencies or officers of the county, when requested, in all civil matters in which the county or state is interested or relating to the discharge of the official duties of such departments, boards, commissions, committees, agencies or officers; ... (4) [p]erform[ing] all duties in connection with civil matters relating to the county or any agency, board, commission or officer thereof.” Wis. Stat. §§ 59.42(2)(b)(2), (4). When advising clients, the OCC may opt to opine informally or formally. What constitutes a “formal written opinion” of the OCC is not defined by Wisconsin Statute, ordinance, resolution, AMOP, or otherwise. Often, when an issue is of broad interest to numerous clients, the OCC will issue formal written guidance on letterhead, reviewed, approved, and cosigned by the Corporation Counsel (“formal opinion”). The OCC may amend, modify, reverse, vacate, or supplement such formal opinion at any time based on changes in the facts or the law or other circumstances requiring the same. Oral statements, email communications, or written opinions without Corporation Counsel as signatory are not formal opinions of the OCC and, to the extent a conflict exists between a formal opinion and such informal guidance, the formal opinion takes precedence. Email guidance is provided as a professional courtesy to provide clients feedback as quickly as possible, especially where the issue is narrow or has been previously opined upon. As such, the OCC requests that emails not be disclosed to the press or third parties without first consulting with the OCC. That said, the client may decide whether to share email guidance.

<sup>4</sup> This formal opinion supersedes these informal oral and emailed opinions.

<sup>5</sup> This formal opinion incorporates by reference these prior opinions.

- March 13, 2020: Formal written opinion regarding the emergency powers (*see* File No. 20-290);<sup>4</sup>
- Nov. 1, 2017: Written formal opinion regarding the Executive’s obligation to implement legislative enactments (*see* File No. 17-563);<sup>4</sup>
- June 8, 2017: Formal written opinion regarding difference between multiyear contracts and option contracts (*see* File No. 17-385);<sup>4</sup>
- March 3, 2017: Formal written opinion regarding the conflicts among state statutes created by Acts 14 and 55 (*see* File Nos. 17-274, 17-69);<sup>4</sup> and
- March 3, 2017: Formal written opinion re contracting authority (*see* File No. 17-275).<sup>4</sup>

This memorandum begins with a summary of our opinions. Second, we present a detailed review of the procedural background and details of the COVID-19 Directives enacted by the County. Third, we provide a summary of the OCC’s legal analysis regarding the unique division of powers and authorities among the Board and the CEX in Milwaukee County. That detailed legal analysis, which will be set forth in a separate memorandum issued substantially contemporaneously with this memo, synthesizes, for the first time, the OCC’s March 3, 2017 comprehensive statutory analysis of 2013 Wis. Act 14 (“Act 14”) and 2015 Wis. Act 55 (“Act 55”), and other relevant opinions, with the only binding interpretation of those laws issued to date by a Wisconsin court, *Lipscomb v. Abele*, No. 16-CV-2888 (trial court decision, J. Dimotto, Apr. 24, 2017), and 384 Wis. 2d 1, 2018 WI App 58 (Ct. App. 2018)(JJ. Blanchard, Kloppenburg, and Fitzpatrick). Fourth, with that law in mind, we analyze the following COVID-19 mitigation directives: (1) vaccine mandate, (2) health screening, (3) masking; (4) social distancing;<sup>6</sup> (5) response to COVID positive, symptomatic, or exposed individuals; (6) capacity limits; (7) telework; and (8) reopening rules,<sup>6</sup> offering opinions as to what a court would likely conclude if faced with the question before us as to each directive. Finally, we offer options to move forward, grounded in one collective goal: the most efficient and effective mitigation efforts to protect and improve the health and safety of all County employees and residents.

This memorandum contains four sections: (I) Summary of Opinions, (II) Background, (III) Summary of Relative Powers and Authorities, (IV) Analysis, and (V) Moving Forward.

## **I. Summary of Opinions.**

With respect to actions relating to COVID-19 mitigation, a court would most likely analyze the relative powers of the Executive and the Board differently depending on whether the directive in question concerns (a) whether to act, (b) what to do, or (c) how to do it. In general, the question of whether to act is most susceptible to the Board’s traditional policy making function, while the question of the specifics on how to act will fall squarely within the Executive’s exclusive scope of

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<sup>6</sup> As of the issuance date of this memorandum, neither the social distancing rules, nor the reopening rules appeared on the County’s COVID-19 webpage. They are not discussed separately herein, but to the extent that portions of these rules are subsumed by other directives, the analysis of other rules applies equally thereto.

authority. The second category – what to do -- is subject to the greatest debate, as limited by Acts 14 and 55's expressly reallocating certain powers to the Executive.

The OCC's opinions are as follows:

- More likely than not, a court would conclude that the Board may decide, as a policy matter, whether – in the first instance --to mitigate COVID-19.
- A court could conclude that the Board has the power to direct the Executive to use particular mitigation tools, as opposed to others. Strong counterarguments exist, however.
- Regardless, a court would more likely than not conclude that the Board does not possess the power to review, amend, reject or approve the Directives issued by the Executive to mitigate COVID-19, as now contemplated by the proposed amended resolution to File 22-419.
- A court would more likely than not conclude that the CEX has the power to issue the Directives at issue here without Board approval, subject to the following nuance:
  - Given that the Board approved the vaccine mandate, it is nearly certain that a court would affirm the Executive's power to expand that mandate to require boosters in certain circumstances and that all new employees be fully vaccinated.
  - Whether to permit County employees to telework is arguably a policy question that the County Board may weigh in upon, but it is a close question given the Executive's exclusive power to control how employees fulfill their job duties. Regardless, the *specifics* of telework rules are not the proper purview of the Board, and a court would not permit the Board to review, amend, or reject specific telework operational rules.

## **II. Background.**

### **A. COVID-19 Declared a Global Pandemic.**

In March 2020, the World Health Organization declared the Novel 9 Coronavirus Disease (COVID-19) a global pandemic. On March 13, 2020, then County Executive Chris Abele declared a local public health emergency and issued a "Proclamation of Existence of a County Emergency" ("Proclamation") pursuant to Wis. Stat. § 323.14(4)(b). On March 13, 2020, the OCC provided its legal opinion on the statutory emergency powers of the county executive and county board, and expanded that opinion on September 22, 2021. *See supra* at p.3.

Since March 13, 2020, the County has created, implemented, and managed various mitigation and safety measures to slow the spread of COVID-19 to protect employees, service users, and the public. From a procedural and operational perspective, this was done through Administrative Orders issued by the CEX.

On February 3, 2022, the Board adopted a resolution that terminated the Emergency Proclamation and related orders as of April 1, 2022. (*See Ex. 2*, also in Legistar in File No. 22-298 (signed by the Executive on February 25, 2022)). File No. 22-298 also required the Executive to submit an action report to identify which rules/directives (1) were ratified by the County Board;

(2) require approval of the County Board to have effect; and (3) do not require approval of the Board under state law to have effect.

## **B. Rulemaking Framework Proposed in File No. 22-419.**

In response to File No. 22-298, on approximately February 18, 2022, the CEX submitted File No. 22-419 to “[p]rovide Supervisors with background information on currently operative Administrative Orders, and request adoption of a framework for mitigation measures for COVID-19 within the organization and facilities of Milwaukee County.” (See Ex.3, also in Legistar in File No. 22-419.)<sup>7</sup>

### **1. CEX Submits Report on Operative Work Rules and Facility Rules.**

The Action Report (the “Report”) in File No. 22-419 identified eleven (11) Administrative Orders (hereinafter, “AO”) issued by the CEX under the Emergency Declaration to address and manage the County’s pandemic mitigation response. Each AO concerned the use of various mitigation tools and the implementation particulars for each. As of February 18, 2022, three AOs had expired by their own terms.<sup>8</sup> The remaining AOs were: Vaccine mandate (AO 21-3v3); health screening (Ex. 4, AO 20-17v4); face masking (AO 20-14v8); In-Person Worker Rules (Social Distancing and Symptomatic Employees and Contractors)(Ex. 5, AO 20-4v1); Responding to Confirmed Cases of, Symptoms of, or Exposure to COVID (AO 20-7v9); Telework AO: replaced by a rule/process adopted by the Administrative Manual of Operating Procedures (AMOP) Committee, administered by HR (Ex. 6, AO 20-3v1; Ex. 7, AMOP Chapter 02.20 Telework Policy issued 07/19/2021);<sup>9</sup> Facility Capacity Limits (AO 22-1); and Service Risk Mitigation and Reopening Requirements (Ex. 8, AO 20-13v10)(collectively, “COVID-19 Directives” or “Directives.”)

The Report stated that the remaining AOs would be transitioned to work rules or facility rules as of April 1, 2022. This action would be based on the Executive’s statutory and constitutional powers, *see supra*, other OCC formal and informal opinions.

The Report made clear that the County Board approved only the vaccine mandate (*see* File No. 21-34) and no other Directives. The Report did not, however, specify which of the other Directives do or do not require approval by the Board.

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<sup>7</sup> The Report was prepared by the COVID-19 Policy Coordinator, Peter LaBonte, in consultation with Dr. Ben Weston, Chief Health Policy Advisor, among others.

<sup>8</sup> These AOs expired by their own terms prior to April 1: Uses and Priority of Supply of Face Masks and Respirators (maintained as a reference for employees on the intranet); Expanded Paid Sick Leave (AO 21-1v4, expired on March 31, 2022); and “Vaccin8” employee vaccination recognition program (AO 21-2v1, expired on Dec. 31, 2021.)

<sup>9</sup> “The Milwaukee County Administrative Manual of Operating Procedures (AMOP) contains the procedures that guide the operation of County government, in compliance with federal, state and local law.” (*See* AMOP Manual, available on CLIC.) The AMOP “compiles a database for County procedures and policies,” and is intended as a resource for employees, citizens and people who do business with the County. *Id.*

Instead, the Report proposed a framework, which if approved by the Board, would establish a workgroup that would recommend all COVID-related rules for the Executive’s approval. If the Board had adopted this framework as proposed without amendment, then: (a) all workgroup meetings would be public meetings, subject to open meetings laws, Wis. Stat. §§ 19.81 *et. seq*; and (b) if a court ultimately concluded that a rule was subject to Board approval, the Board delegated that oversight function to the workgroup.

**2. CEX Proposed Framework for Adoption in File No. 22-419.**

The resolution<sup>10</sup> in File No. 22-419 introduced by the CEX proposed the following:

- (1) Milwaukee County will move from using Administrative Orders based on an Emergency Declaration to a series of policies that reside within the Departments charged with implementation (to include, but not necessarily limited to, the Department of Human Resources, the Division of Facilities Management within the Department of Administrative Services, and others);
- (2) Adoption as the policy of the County the following “step-wise framework:”

<b>Policy Area</b>	<b>Low Activity</b>	<b>Medium Activity</b>	<b>High/Very High Activity</b> <i>(as of 2/18/22)</i>	<b>Critically High Activity</b> <i>(as of 1/6/22)</i>
<b>Telework</b>	Depts encouraged to follow long-term teleworking policies	Depts encouraged to bring back some staff as needed	Staff who can telework encouraged to do so	Access to facilities for essential staff only
<b>Masking</b>	Masking for those with symptoms	At department discretion for vaccinated staff; marks mandatory for unvaccinated staff	Masking for all staff at all times when on-site and in public areas	Masking for all staff at all times when on-site and in public areas
<b>Facility Capacity</b>	100% Capacity	100% Capacity	Decrease capacity as able given department discretion	Minimize capacity levels as able based on critical needs
<b>Health Screening at Facilities</b>	Self-screening for symptoms encouraged	Self-screening for symptoms encouraged	All staff entering facilities take online health screening	All staff entering facilities take online health screening
<b>Cleaning Standards</b>	Daily cleaning regimen	Daily cleaning regimen	Enhanced cleaning regimen in high volume spaces	Enhanced cleaning regimen in high volume spaces

<sup>10</sup> A Milwaukee County resolution, including the budget, is subject to the full veto and override process and is on equal footing with an ordinance. *See* Wis. Constitution 23a and Wis. Stat. § 59.17(6).

- (3) [M]ovement between levels of the [above] framework will trigger primarily based on the State of Wisconsin's Department of Health Services Disease Activity Composite Measure, while also taking into account subjective measures that cannot be accounted for in pure data, as indicated by Milwaukee County's Chief Health Policy Advisor. These may include, but are not necessarily limited to, national and international disease trends, hospital capacity concerns, and the emergence of new variants of concern);
- (4) to ensure alignment across mitigation policies, a central workgroup will be established that will consist of the Chief Health Policy Advisor, the Office of Corporation Counsel, the Office of the County Executive, and departmental representatives as necessary; and
- (5) a member of this workgroup will be designated to report to the appropriate standing committee of the Milwaukee County Board of Supervisors on a monthly basis.

(See Ex. 9, Resolution.)

The stated goals and assumptions of File 22-419 included:

- continu[ing] County operations for its residents while keeping its staff and participants safe;
- continu[ing to] develop[] and execut[e] these policies in response to guidance issued by the Centers for Disease Control and Prevention (CDC) and State of Wisconsin Department of Health Services (DHS),
- recognizing that the COVID-19 pandemic is dynamic and will remain an ongoing challenge that requires an approach that can adapt with the changing nature of the virus; and
- [using] science, public health expert guidance, and data continue to necessitate rapid changes in COVID-19 mitigation policies, notably seen in the latest surge in cases from the omicron variant.

(*Id.*)

Finally, the framework proposed required reporting by the workgroup to the Board each legislative cycle, and specified data sources and data points as the "objective measures" that would trigger changes to rules, as well as other subjective measures that would be considered (such as national and international disease trends, hospital capacity concerns, and the emergence of new variants of concern).

### **3. Board Asserts its Oversight Power.**

As of April 1, 2022, the Directives were still in place. *See supra* OCC Opinions issued March 13, 2020 and Sept. 22, 2021. At that time, they were transferred to the Department of Human Resources to be managed as work and facility rules, along with the Telework AMOP.

On March 10, 2022, the Committee on Judiciary, Safety, and General Services recommended that the Board reject File No. 22-419. Supervisor Staskunas stated that the reason for rejection was that, under the proposed COVID-19 mitigation framework, the Executive would “retain the authority and power to reinstitute certain orders put in place during the emergency, without having to seek the Board’s approval.” (*See* audio recording, 3/10/22 Judiciary Committee meeting, available on Legistar.)

At the full Board meeting on March 24, the Board adopted an amended resolution (the “Resolution,” *see* Ex. 10.) by which it agreed to the framework proposed by the Executive, with one key change. The amendment required that, while any rule issued (or presumed to remain in effect as of April 1) by the Executive may take effect upon issuance without Board approval, the CEX must submit the rule to the Board for power approval, amendment, or rejection (subject to the standard veto/override process).

### **4. Amended File No. 22-419 Vetoed.**

The Executive vetoed File No. 22-419. The veto message stated, in part:

I object to the amended portion of this file in that it would violate the division of powers between the Office of the County Executive and the County Board under state law. The amendment effectively hamstring Milwaukee County’s ability to secure the health and safety of our staff and prevent us from maintaining a productive workforce. The Administration will continue to use the framework as laid out in this file to ensure the safety of Milwaukee County employees and members of the community who use our services; however, these mitigation procedures fall within the powers of the Office of the County Executive to exercise day-to-day control of county functions as contemplated by Wis. Stat. § 59.794(3)(a).

...

It is my promise ... that I will implement, without alteration, the work rules and facility safety measures recommended by the workgroup. I will not politicize public health.



In conclusion, the directives that I have issued since the expiration of the Emergency Order, and those that our administration will continue to issue in consultation with experts, fall within the powers granted to my office by state statute. I remain committed to transparency with your honorable body and the public and will continue my administration's practice of providing updates as to the status of COVID-19 mitigation procedures as we have done from the original issuance of mitigation procedures under the now-defunct Emergency Order.

(Ex. 11.)

The Executive invited discussion among the Board and DHHS, the County's advisors from the Medical College of Wisconsin, and the County's Chief Medical Advisor, Dr. Ben Weston, regarding the health and safety reasons underlying the COVID-19 Directives.<sup>11</sup> He wrote that, despite the impact of COVID over the past two years, the County has been able to “stay nimble, regularly pivot and continue to deliver for our most vulnerable residents,” and that “[o]ur focus and attention should remain on safety, accomplished through swift action informed by appropriate experts, and we must remove politics from our day-to-day operations.” (*Id.*)

Pursuant to File 22-419 and the corresponding veto message, the Executive has continued to implement COVID-19 Directives, which are administered and managed by HR as work rules and facilities rules. HR has managed the Telework AMOP, with final decision-making left to the individual department leaders to determine how best to apply telework rules in their particular departments.

### **III. Summary of Relative Powers and Authorities.**

We summarize the OCC's forthcoming detailed legal analysis memo, regarding the powers of the CEX and the Board, as defined under Wisconsin Statutes, as interpreted by the Wisconsin Court of Appeals, and previous OCC guidance:

- There is an implicit conflict between traditional separation of powers principles and the extensive and explicit statutory grants of nearly unlimited authority to the Executive under Wisconsin Statutes.
- We conclude that the customary division of powers (*i.e.*, legislature sets policy and adopts the budget, while the executive branch determines how to execute those policies,

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<sup>11</sup> The veto message explained the COVID-19 dashboard (*i.e.*, EVE Model), created by the County expert team, “combined the CDC's Social Vulnerability index with COVID-19 vaccination rates to create 16-box grid color coding jurisdictions for targeted interventions” and “was published in the American Journal of Public Health, adopted by the CDC as of August 2021, and has become the lodestar national model.” (*See id.*)

fulfills all other mandates under applicable law) was fundamentally altered by Act 14 and Act 55.

- Where the statutory grants of power are evident and indisputable based on the plain language of the statute, courts have concluded that those powers are virtually unlimited, but where the statutes do not clearly assign a power to the Executive and instead appear to have generally shifted a power to the Executive, those statutes must be applied using the traditional construct. (*Compare* Wis. Stat. § 59.17(2)(b)(3)'s explicit grant of virtually unlimited power to the Executive to sell, acquire, and lease all nonpark property, with its general reassignment of the powers previously held by the Board under Wis. Stat. § 59.52(6) to the Executive, without more detail.)
- Where the statutes are silent, the traditional framework must govern.<sup>12</sup>
- Notably, Act 14 addressed Executive powers in two broad categories: control over property/contracts and control over the workforce/departments. Act 55 further specified the Executive's powers over property and contracts. The legislature's approach to these issues provides a useful structure to analyze the questions addressed here.

**A. Power to Control and Contract Regrading Real Estate and Other Property.**<sup>13</sup>

1. Writ large, the Executive enjoys virtually untrammelled power to control all nonpark property, including buildings, facilities, personal property, intellectual property, trademarks, websites, software, equipment, supplies, public works, etc., as explained below;
2. Related to nonpark property, the Executive can execute any goods or services contract, professional services contract, revenue contract, or procurement contract (and possibly issue bonds) without Board approval, subject to signature formalities, except where a contract requires spending beyond the current fiscal year;
3. Related to park property, as to services contracts, revenue contracts, concessions contract, and procurement contracts with a value ...
  - less than \$100,000 and not multiyear, the Executive may unilaterally execute;
  - between \$100,001 to \$300,000 and not multiyear, the contract is subject to passive review by Finance Committee only; or
  - greater than \$300,000, the contract is subject to full Board review; and

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<sup>12</sup> For example, the Board will always have the power to adopt a budget. In this way, the Board has front-end control over the Executive's powers by establishing the budgets for each administrative department. And by extension, all executive branch powers are limited by whether any necessary spending is within a department's allocated budget. If the action exceeds an allocated budget, the administrative department must submit a request for a budget transfer, thereby providing the Board an indirect means to oversee (and potentially block) the Executive/department's preferred action.

<sup>13</sup> See OCC Opinion dated March 3, 2017, File No. 17-275.

4. **Park real estate** leases of greater than 1-year, sales, acquisitions, or easements, and any multi-year contract related to **park property** require full County Board approval; and
5. The Executive enjoys unilateral power over **public works** projects except where an action requires spending beyond the current fiscal year.

**B. Power to Manage the Workforce.**<sup>14</sup>

The legacy compensation system in Milwaukee County currently determines an individual's compensation:

- Every existing position is assigned to a specific job classification, with the aim of grouping positions with similar or identical functions, across departments, to the same classification, to promote pay equity and consistency across the County;
- each existing classification has an established pay range with a minimum and maximum compensation rate;
- each existing classification pay range has steps setting different compensation rates within a range from minimum to maximum;
- reallocations occur when all jobs assigned to one classification require a new classification/pay range (an entire classification, regardless of positions included therein, must be adjusted due to changes in comparables);
- reclassifications occur when one particular position or employee is be moved from one classification to another because the job duties for one specific position (or employee) have changed;
- employees are moved step-by-step through a range;
- new positions may be created and assigned to existing classifications;
- new classifications may be established if no current classification is appropriate; and
- new employees are hired into specific positions at specific compensation rate steps within the range.

The CEX and the Board employ these powers as follows:

1. **The Board has the power to** (typically via review, amendment, rejection, and/or approval of an Executive's request/resolution):
  - i. create new positions;
  - ii. assign a new position to a classification;
  - iii. change steps within a classification;
  - iv. reallocate (i.e., change the pay range for a classification).
2. **The Executive may, without Board approval:**

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<sup>14</sup> This summary applies to the vast majority of classified and unclassified (aka "exempt") positions, making no distinctions among the same, and excludes employees subject to specific statutes and other rules (e.g., appointees/department heads, fire and police union members, employees subject to 2013 Wis. Act 203).

- i. hire, fire (subject to applicable civil service rules/processes), and set an individual employee's compensation within a classification range;
- ii. reclassify a position;
- iii. move employees through their applicable classification pay range steps;
- iv. manage, supervise, and direct employees day-to-day;
- v. establish HR processes, procedures, and work rules;
- vi. establish departments and subunits.

Importantly, the Wisconsin court of appeals concluded that the Board's "compensation-fixing power" cannot directly or indirectly establish the duties of an employee and/or direct how an employee must fulfill those duties. *See Lipscomb*, 2018 WI App. 58, ¶ 4. Only the Executive may determine the duties of employees and how they must fulfill them. *Id.*

#### IV. Analysis.

We analyze the relative powers and duties of the CEX and the Board as to each of the COVID-19 Directives in two categories: (1) directives that control operation and maintenance of the County's buildings, structures, and facilities (collectively, "facilities"), which apply to County employees, contractors, visitors, and the public (collectively, "Facilities Directives"); and (2) workplace health and safety directives, which apply to County employees and contractors only (collectively, "Workplace Directives").

Our opinion is that, if challenged, absent further action in File No. 22-419 by the Board, a court is more likely than not to uphold each of the Directives, with certain nuances noted below. *See supra* n.6. Stated differently, it is the opinion of the OCC that a court would not find that the Directives are subject to Board review, approval, amendment, or revocation after issuance, as contemplated in the amended resolution in File 22-419.

Our opinion is consistent with the traditional notion that the county executive functions as an administrator and manager, while the county board's function is policy making and legislative. *See e.g., Schuette v. Van De Hey*, 205 Wis. 2d 475, 480-81, 556 N.W.2d 127 (Ct. App. 1996); 72 Wis. Op. Att'y Gen. 161 1983 WL 180895, at \*3 (1983) (the county executive is empowered to "coordinate and direct...all administrative and management functions of the county government not otherwise vested by law" and "the power to supervise personal on a day-to-day basis would appear to be an administrative and management function."). Our opinion is further consistent with Acts 14 and 55, which reallocated powers away from the County Board and to the Executive. Our opinion also is consistent with the *Lipscomb v. Abele* caselaw. And finally, our opinion is consistent with all our prior guidance on this topic, *see supra*.

Importantly, as to any Directive, a court would likely look at each in terms of: whether to act in the first instance, what to do, and how to do it. Again, in general, the question of whether to act is most susceptible to the Board's traditional policy making function, while the question of the specifics on how to act will fall squarely within the Executive's exclusive scope of authority. The second category is subject to the greatest debate, limited by Acts 14 and 55's express

reallocation of certain powers to the Executive. Thus, the more the Board tries to insert itself into detail-level decision making involving the what and the how, especially in the form of a post-issuance review with line-by-line editing powers, thus substituting its judgments for those of subject matter experts, the less likely a court would be to affirm the Board's action as a proper exercise of the Board's traditional policy-making power.

As such, an argument could be made that whether to mitigate COVID-19 at all, and/or whether to use these specific tools to do so (vaccine mandate, screening, masking, distancing, response to positive/symptomatic/exposed coworkers, capacity limits, telework, and reopening rules), are high-level policy decisions that the County Board may dictate or review. Following that line of thinking, if the County Board took action to direct the Executive to cease all COVID-19 mitigation efforts, for example, the OCC's opinion is that such would be more likely to survive a legal challenge than the Board's broad action via File No. 22-419 to require the Executive to submit all Directives after issuance, regardless of subject matter or level of detail, to the County Board for review, amendment, approval, or revocation.

Similarly, if the Board took action to direct the Executive to consider additional or different tools than those he has elected to use in the Directives, a court would face a closer question as to whether such action was within the Board's powers, than a challenge to the Board's instant action. Further still, if the Board took action to direct the Executive to consider different objective data points, to specify different data sources, or to specify different subjective factors than those set forth in the Directives, a court might also find that to be a closer question than the instant issue. A court is also more likely to uphold an action by the Board to place a reasonable number of selected representatives on the workgroup. A court might also look more favorably upon higher level directives from the Board to the Executive regarding thresholds for changes to rules or actions that do not replace the judgment of the subject matter experts that the Executive relies upon.

When analyzing these questions, the OCC and courts often will look at the statutory language, but also consider the specific unique facts and circumstances surrounding the question of authority. *See, e.g., Lipscomb v. Abele*, 16-CV-2888 (Apr. 24, 2017) (Ex. 12); 2018 WI App 58, 384 Wis. 2d 1, 918 N.W.2d 434 (Ex. 13). . The OCC and courts will consider the following sorts of factors, to analyze whether a given action (i.e., requiring masks to be worn by employees, requiring the public to wear masks) is day-to-day management, not subject to Board approval or rejection, or a policy, that must be reviewed and voted upon by the Board.

- Whether something is called an AMOP, work rule, policy, framework, directive, process, etc. is not dispositive, but may be probative.
- What is required to determine or implement the action – does it require a detailed assessment of data or other analysis?
- How urgently needed is the action?
- Does the action require differentiation on a work unit, department, job class, or employee basis?
- Does the action require differentiation by building/facility?
- Does the action require or use expertise?

- Is the action a deviation from universal processes or policies?

Here, the OCC finds that an analysis of these factors would not support the Board's proposed powers set forth in the amended resolution, giving the grant to the Board of control and amendment powers over each and every Directive after issuance. The basis for this conclusion includes the following reasons:

- Expertise is required to determine whether to issue a Directive;
- Expertise is required to identify what tools to deploy in the Directives;
- Expertise is required to identify, assess, and understand the objective data points and subjective factors used to draft the Directives;
- Expertise is required to identify, assess, and understand the objective data points and subjective factors used to update, alter, or eliminate Directives;
- Differentiation is required among buildings, functions, and employee departments;
- Employee-by-employee determinations are required for work rule Directive compliance;
- Confusion would result if directives were subject to amendment or revocation by the County Board days or weeks after implementation;
- Confusion from near-term changes or revocations to directives could lead to decreased compliance and an erosion of the Executive's ability to maintain and operate facilities and/or to manage the workforce;
- Confusion from near-term changes or revocations to directives could decrease trust in County government's ability to objectively craft rules, free from partisan rancor; and
- The Board lacks immunology/virology/public health expertise, as well as the data used to craft these detailed rules. The administration would, of course, provide the Board with data and information and testimony, but the administration's experts are reviewing data every day, conferring with state and national immunology and virology experts, and aggregating that knowledge and expertise to inform decision-making. The administration is also in a better position relative to the Board to coordinate efforts and collaborate with other local governments. A court would likely find it unreasonable and incompatible with the oversight and high-level policy making function of the Board, to commit the capacity, time, and expertise required to issue and amend these rules as the situation evolves. Importantly, in his veto message, the County Executive stated that he would implement the rules recommended by the experts, including Dr. Ben Weston, "without alteration."

#### **A. CEX's Power to Control Facilities without Board Approval.**

Of the current Directives, half are Facilities Directives (screening (also a workplace directive), masking, capacity, and reopening). The OCC's opinion is that, if challenged, a court is nearly certain to uphold (a) the Executive's decision to issue Facility Directives, (b) the Directives themselves, and (c) his determination as to how to implement them, without Board approval. *See* Wis. Stat. §§ 59.52(6), 59.17(2)(b)3. The Executive's power to operate and maintain County

property, which includes facilities, appears to be exclusive, such that the Board has no power concerning the operation and maintenance of County property.<sup>15</sup>

The Facilities Directives are summarized here:

1. **The facility health screening directive** established health screening and response requirements for all those that enter facilities, procedures for completing the screening questionnaire, procedures for a temperature check when required, defines symptoms of COVID-19, and sets forth verification process. It also differentiated between high risk facilities and other County facilities. Finally, it established processes for responding to and reporting results of health questionnaire and temperature screenings, symptoms of COVID-19, confirmed case of COVID-19, and exposure to COVID-19 (including definitions of “close contact”).
2. **The facility face mask directive** outlines the expectations for mask wearing for everyone entering or working in Milwaukee County facilities, grounds, or other places where County services are delivered. The directive identifies the types of face masks allowed (and not allowed) for employees, contractors, volunteers, visitors, and other individuals. It includes a table that details when face masks are required, depending on the COVID environment. Since April 1, 2022, the face mask directive has been administered and managed as a work rule by HR. (Ex. 14.)
3. **The facility capacity limits directive** proscribes specific capacity limits for all facilities owned or operated by the County, except for “essential facilities,”<sup>16</sup> which set their own capacity levels. Capacity limits are measured by the number of persons that may occupy a particular space per 30 square feet or more specific directives for private vehicles used for County business, County vehicles, and dancing (for private parties in rental spaces). The County facilities are managed by multiple departments, and these limits affect all facilities, regardless of department management. Since April 1, 2022, it has been administered and managed as a work rule by HR. (Ex. 15.)

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<sup>15</sup> There is an argument to be made that the Board, not the Executive, has power over Directives to the extent they apply to facilities located on parkland. However, there is a stronger countervailing argument that the CEX’s power to operate and maintain County property includes facilities on parkland, because (1) the Directives have nothing to do with the sale, acquisition, or lease of County property, *see* Wis. Stat. § 59.17(2)(b)(3), and the Executive’s broad powers to operate and maintain County property supersede any role of the Board to do so; and (2) as a matter of public policy, a court likely would reject any statutory interpretation that resulted in one set of Directives applying to facilities on parkland and another to all other facilities as it would certainly create confusion for County employees, contractors, and the general public.

<sup>16</sup> Essential facilities include the courts, correctional facilities, hospitals, and airports.

To carry out his obligation to “operate and maintain” County facilities, the CEX must issue the Facilities Directives in order to make the facilities as safe and operational as possible. This requires regular, sometimes daily, action by the County Departments responsible for the respective facilities through their employees. The CEX, through its COVID experts, determined that the Facility Directives are integral and necessary tools in the County’s COVID mitigation tool kit, helping to ensure the safe operation and maintenance of County facilities, while keeping staff and the public safe, after the termination of the emergency proclamation, based on up-to-the-minute COVID expert guidance. The CEX regularly updates Facilities Directives in response to changes in the Centers for Disease Control’s (“CDC’s”) COVID Community Level Rating classification and local trends identified by the Milwaukee County Chief Health Policy Advisor.

## **B. CEX’s Power to Manage the Workforce without Board Approval.**

Our opinion is that the CEX has exclusive power to issue the detailed workplace processes and procedures to be implemented and managed by the Departments, without Board approval, pursuant to Wis. Stat. § 59.17(2)(b)(1), (2) and § 59.794(3). In addition, with the probable exception of the Telework AMOP, the CEX’s power to operate and maintain County facilities and “[m]ake *all orders* concerning county property” arguably provides an additional source of exclusive power to the Executive to issue the Workplace Directives.

The Workplace Directives are summarized as follows:

1. **The vaccine mandate** was originally issued as an administrative order by the CEX and was submitted to and approved by the Board. (*See* AO 21-3v1; File No. 21-34). The directive includes: specific requirements for vaccination for employees, County contractors and volunteers, and those accepting employment with the County; documentation processes for vaccinated individuals; the process for employees requesting an exemption or accommodation; various rewards and incentives for vaccination; potential consequences for noncompliance; and additional risk mitigation measures for unvaccinated employees with special rules regarding employees working in high-risk facilities.

On January 18, 2022, the CEX supplemented the directive to require that those employees, contractors, and volunteers working at the County’s high-risk facilities receive boosters. The directive described the documentation process, booster eligibility, booster verification process, accommodation process, potential rewards and incentives for getting the booster, and consequences of noncompliance.

Effective February 4, 2022, a condition for employment for positions in the County’s high-risk facilities was up-to-date vaccinations including boosters or approved medical or religious accommodation documentation. The CEX did not submit these additional directives to the Board for review or



approval.<sup>17</sup> Since April 1, 2022, the vaccine mandate procedure has been administered and managed as a work rule through HR. (See Ex. 16, “COVID-19 Vaccine Mandate Procedures for Milwaukee County, Version 1.0, April 1, 2022.”)

Although neither of the vaccine mandate expansions (i.e., the booster requirement for those working in high-risk facilities and as a condition of employee for new employees), were approved by the Board, a court is virtually certain to find that both are valid exercises of the CEX’s exclusive day-to-day control over the County departments, furthering the established policy of the Board-approved vaccine mandate.

2. **The health screening directives** were applicable only to employees at the County’s high-risk facilities prior to reporting for in-person work as of April 1, 2022. (See Ex. 17, “COVID-19 Health Screening Procedure, Version 1.0, April 1, 2022.”)
3. **Procedures for responding to positive, symptomatic, or exposed coworkers** set forth directions for employees, Department leaders and supervisors, and recent visitors as to how to respond to individuals with confirmed cases of COVID-19, with COVID symptoms, directions for employees, their supervisors, and recent visitors regarding how to respond to individuals exposed to COVID-19; return to work procedures for each group (with COVID diagnosis, with symptoms, with exposure, recovered from COVID, with vaccination, unvaccinated); what to do when an employee calls in sick with symptoms, reports to work with symptoms, or develops symptoms while at work, or when a contractor or visitor to a County location exhibits symptoms while at a County location; what to do when a critical infrastructure employee has been exposed; and additional isolation and quarantine guidance. Since April 1, the directive has been administered and managed as a work rule by the Department of Human Resources. (See Ex. 18, “Procedures for Responding to COVID-19,” Version 1.0, April 1, 2022.)
4. **Telework AMOP.** The telework directive was originally issued as an administrative order by the CEX on March 16, 2020 and was not submitted to the Board for review or approval. On or around July 19, 2021, pursuant to the AMOP process, the telework directive was reviewed and approved

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<sup>17</sup> The Board has adopted resolutions implementing incentive programs for incarcerated individuals sponsored by Supervisors. For example, a resolution was adopted on March 24, 2022, modifying the vaccine incentive program for those housed in the House of Correction (HOC) or County Jail/Criminal Justice Facility (CJF) to permit the appropriation of \$50 increments to those occupants who receive a second dose of a two-dose vaccine and/or a COVID-19 booster shot and authorizing the inclusion of youths held at the Youth Detention Center who get vaccinated. (See File No. 22-431, available on CLIC, see also File No. 21-632.)

by the County's AMOP Committee for review and approval as standard County telework procedure. (*See Ex. 7.*) Since then, the telework procedure has been administered and managed by HR through Department heads, to whom final decision-making authority has been delegated to meet the particular needs of each Department and its employees. The telework directive contains rules for preparing and executing telework, terms and conditions of teleworking including LMS mandatory online training, rules for using technology, equipment care, IMSD's right to monitor, and expense rules, and other detailed expectations, guidelines, and procedures for County employees to work remotely. County leaders, managers, and IMSDI staff were charged with assisting such implementation including providing the necessary equipment for telework.

The CEX regularly updates Workplace Directives in response to changes in the CDC's COVID Community Level Rating classification and local trends identified by the Milwaukee County Chief Health Policy Advisor.

Regarding the Telework AMOP, given the persistence of the COVID-19 pandemic, if challenged, a court would more likely than not uphold this Directive absent further action by the Board. Whether to allow remote work by County employees *outside of the declared COVID-19 emergency* certainly appears to be a high-level policy decision. On the other hand, telework procedures and processes, which expressly direct how County employees may or must perform their duties, arguably fall under the CEX's day-to-day control as defined by the *Lipscomb* court. But if the Board acts to forbid telework as a general policy, a court would be presented with a novel and close question. That said, a court would not uphold the Board's instant action, which subjects the Telework AMOP issued by the Executive to detail-level editing and amendment by the Board.

## V. Moving Forward.

As a practical matter, as of April 1, 2022, absent further legislative or legal action by the Board, all Directives issued by the Executive are in effect. Should the Board overrule the Executive's veto of File No. 22-419, the Executive would be presented with two options: accede to the Board's oversight or proceed with issuance, amendment, and enforcement of the Directives in his sole discretion, despite the legislation.

If the Executive chose to ignore the Board's legislation if his veto is overridden, the Board would have three options: (1) do nothing and permit the Executive to issue Directives in his sole judgment; (2) pursue different legislation that addresses clearly high-level policy preferences as detailed herein; or (3) press litigation against the Executive to seek clarification of these powers. A writ for mandamus is the method for addressing balance of power disputes. "Mandamus is an 'extraordinary writ' that may be employed to compel public officers to perform a duty that they are legally obligated to perform." *In re Doe*, 2009 WI 46, ¶ 10, 317 Wis. 2d 364, 372, 766 N.W.2d 542, 546. To pursue a mandamus action, one or more supervisors or other interested parties would

file an action in Circuit Court, naming the County Executive or an administrator as defendant, and ask the Court to order that the policies described in the Resolution be carried out as stated. Outside counsel would be required, given the OCC's inherent conflict of interest on this issue noted above.

The OCC counsels strongly counsels against litigation to resolve these issues as suboptimal. Litigation would be sure to plunge the County into prolonged uncertainty, expensive and time consuming litigation with a potentially unsatisfying resolution as these disputes rarely lend themselves to clear, easy-to-apply black and white rulings.

Instead, the Board and Executive might wish to consider more cooperative and less costly avenues, such as:

- Establishing detailed reporting requirements to assess the efficacy and continued relevance/need for specific Directives under Wis. Stat. § 59.794(3)(b). *See* Attorney General Opinion OAG-06-13 (August 14, 2013) (“[a] county board lawfully may require county department heads to submit periodic reports as to steps taken in carrying out any directive”); and MCO §1.25(3) (“County officers, department heads or boards or commissions shall from time-to-time report to the county executive and county board the steps that have been taken in carrying out any directive”);
- Consider whether the budget process might provide other potential avenues to ensure cooperative decision-making;
- Informal briefings among Supervisors and administration officials to address concerns, ideas, and solutions.; and
- Requesting that the Executive add 1-2 Board-selected members to the workgroup.

In addition, the Board could consider actions that are more closely aligned with its traditional policy-making function, as compared to the post facto review powers it sought to establish in File 22-419, such as resolutions that establish:

- whether the Board wishes the Executive to issue any rules to mitigate COVID-19;
- tools the Board wishes the Executive to consider to mitigate COVID-19;
- data points and subjective factors the Board wishes the Executive to consider to mitigate COVID-19;
- different sources of data and information the Board wishes the Executive to consider to mitigate COVID-19.

Next, should the Executive's framework as originally introduced in File 22-419 be adopted without the inclusion of a post facto review of the Executive's Directives by the Board, meetings of the workgroup would be public meetings that any Supervisor (or anyone) could watch and observe. By doing so, the Board could hold the Executive accountable to the promise he set forth in his veto message: “I will implement, without alteration, the work rules and facility safety measures recommended by the workgroup. I will not politicize public health.”

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