DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–4956/1dn
PJK/RAC/MES:cx:kjf

February 26, 2002

1. You may wish to provide operating costs appropriations for the small employer reinsurance program and the small employer catastrophic care program. You would have to let me know the amount to include in the appropriations, though. Without any specific appropriations, the administrative costs of the program under s. 635.25 would most likely be paid from s. 20.145 (1) (g). The administrative costs of the program under s. 635.30 might be paid from s. 20.145 (1) (g), or from the segregated fund without a specific appropriation, because of the language in s. 635.30 (2) (b) 4. that allows the board to establish procedures for paying all other operating costs of the program, which could include payment from the segregated fund.

2. Since both of the new boards are created in ch. 15 and attached to OCI, none of the proposed language regarding quorums, compensation for services, election of a chairperson, liability for performance of duties, etc., is needed.

3. Although the two new small employer programs are intended to sunset in five years, I have not included any repeals in this draft. It is conceivable that the programs will be extended, and the text includes dates where appropriate. Some dates must, of course, be determined by rule. In addition, some time after the end of each five–year period will be needed to wrap up operations. Since it would be too difficult to include an accurate date for repeals at this time, any necessary repeals can be accomplished later, as appropriate.

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Please note that the health care coverage plans offered to state employees by the group insurance board already have many of the the key features of defined contribution plans. Also, because the state is obligated to pay up to 105% of the cost of the least costly qualifying plan offered to state employees in their county of employment, the requirement may result in increased costs for state employees for other health care coverage plans. The reason is that the least costly qualifying plan may well turn out

to be the new defined contribution plan. Finally, because the new defined contribution plan may reduce the level of benefits, I notwithstood the requirement under s. 40.03 (6) (c) that the benefits may not be reduced.

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Part of this bill incorporates into the definition of "Internal Revenue Code" the changes made by the federal government in P.L. 106–554. The bill also changes the definition of the IRC to include any future changes made by the federal government to "Archer MSAs" under section 220 of title 26 of the United States Code.

As I've discussed with Brian Dake of your office and Sara Buschman of Representative Urban's office, the incorporation of unspecified future changes to federal law into the Wisconsin statutes could be challenged as an unconstitutional delegation of legislative authority. Article IV, section 1 of the Wisconsin Constitution states that "The legislative power shall be vested in a senate and assembly." If this bill becomes law, it could be argued that by automatically adopting any future change made by the federal government to Archer MSAs, the legislature is unconstitutionally delegating its legislative power to make laws by allowing an external source, the federal government, to dictate substantive changes to the statutes.

The Wisconsin Supreme Court has made a distinction between the delegation of a fact–finding power, which seems to be OK, and a law–making power, which may not be OK, although Wisconsin courts seem to be increasingly willing to uphold statutes that adopt external material, particularly federal law. See, generally, *State v. Wakeen*, 263 Wis. 401 (1953), *Williams v. Hoffmann*, 66 Wis. 2d 145, 155–56 (1974), *Krueger v. Department of Revenue*, 124 Wis. 2d 453 (1985) and, especially, *Cleaver v. Department of Revenue*, 158 Wis. 2d 734, 742 (1990).

Krueger seems to indicate that state adoption of future federal changes in the definition of "adjusted gross income" is OK, but that holding seems to have been limited by *Cleaver* at 739 and 740. The Court also stated in *Cleaver* that "The legislature quite obviously desires the opportunity to review any changes enacted by Congress before such changes become part of Wisconsin tax law." *Cleaver* at 742.

Although the likelihood, and outcome, of a constitutional challenge to this bill, should it become law, is impossible to predict, I thought that you should be aware of the possibility. Please let me know if you have any questions about this issue.

Also, if created section 71.05 (6) (b) 34. ever applies, the dates that relate to indexing the deduction amounts for inflation should probably be advanced.

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