

August 6, 2019

The Honorable Trecia Kimes-Brown  
Vinton County Prosecuting Attorney  
100 East Main Street  
McArthur, Ohio 45651

SYLLABUS:

2019-026

1. A board of county commissioners has no authority to establish a reimbursement program pursuant to which county officers and employees who are not covered by the county insurance plan or policy are reimbursed for all or some portion of the cost which the officer or employee incurs in securing such coverage under a group health care plan or policy through another source;
2. A board of county commissioners may duly establish a Section 125 cafeteria plan which provides to officers and employees of the county the option of (1) accepting coverage under a health care plan or policy provided by the county as permitted by R.C. 305.171(A), or (2) receiving a cash payment instead of the benefit. A cash payment made to any county officer or employee under the Section 125 cafeteria plan may not exceed twenty-five per cent of the cost of premiums or payments which would have been paid by the county for the benefit had it been accepted by the officer or employee; and
3. A board of county commissioners may duly establish an opt-out payment plan which provides that any officer or employee of the county who is not covered under a health care plan or policy provided by the county as permitted by R.C. 305.171 may receive a cash payment in lieu of the benefit. A cash payment made to any county officer or employee under the plan may not exceed twenty-five per cent of the cost of premiums or payments the county would have paid had the officer or employee accepted the benefit. Further, the plan must require that the officer or employee sign a statement affirming that he or she is covered under another plan or policy, and setting out the name of the employer/provider, if any, and identifying number of the policy or plan.



# DAVE YOST

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August 6, 2019

OPINION NO. 2019-026

The Honorable Trecia Kimes-Brown  
Vinton County Prosecuting Attorney  
100 East Main Street  
McArthur, Ohio 45651

Dear Prosecutor Kimes-Brown:

By your letter of March 8, 2019, you have requested an opinion about the authority of a board of county commissioners to reimburse county officers and employees for qualified health care expenses and premiums in light of the Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2010). As part of your letter, you specifically asked whether the board of county commissioners, as a “large employer[.]” 42 U.S.C.S. § 300gg-91(e)(2) (LexisNexis 2019), has authority to reimburse county officers and employees for health care expenses.

In your letter, you make reference to R.C. 305.171(G). This provision permits a board of county commissioners to adopt a policy authorizing a “cash payment” to county officers and employees who choose not to take the group benefits offered by the county. R.C. 305.171(G). Before an officer or employee may receive a cash payment under R.C. 305.171(G), the officer or employee must sign a statement affirming that he or she is covered by another health insurance or health care policy. R.C. 305.171(H). When a board of county commissioners chooses to offer an employer payment plan under R.C. 305.171(G), the board must set a dollar limit on the amount of the cash payments the board provides. R.C. 305.171(G). In this regard, R.C. 305.171(G) states that “[a] cash payment made to a county officer or employee under this division shall not exceed twenty-five per cent of the cost of premiums or payments that otherwise would be paid by the board for benefits for the county officer or employee under an offered policy or plan.” *Id.* You ask whether this practice of limiting the cash payments made by a board of county commissioners pursuant to R.C. 305.171(G) is permissible under the Patient Protection and Affordable Care Act. 42 U.S.C.S. § 18001 et seq. (LexisNexis 2019).

Subsequent to our receipt of your request, our office solicited additional information from you in the context of your letter as clarification of your inquiry. You have responded to our request. On the basis of your original request for an opinion, and your subsequent submission, it is our understanding that:

1. Vinton County currently maintains a group health insurance plan or program for the benefit and protection of county officers and employ and their families;

2. Vinton County plans to continue to offer a group health insurance plan or program for the benefit and protection of officers and employees and their families;
3. It is the desire of Vinton County officials to establish a reimbursement program pursuant to which the County will reimburse county officers and employees who either do not qualify for coverage under the health insurance plan or program offered by the county or decline such coverage for some portion of the premium cost which the officer or employee incurs in relation to his or her securing group health insurance coverage through another employer;
4. Vinton County officials would like to undertake an “opt-out payment” plan as is authorized by R.C. 305.171(G) pursuant to which the county will make a cash payment to any county officer or employee who elects to take the cash payment instead of accepting coverage under the county’s health insurance policy or plan. The amount of the cash payment under this plan will be determined by the county, but will not exceed twenty-five per cent of the cost of premiums or payments that otherwise would be paid by the county to provide coverage for the officer or employee under the county’s policy or plan, and no cash payment will be paid unless the employee signs a statement affirming that the county officer or employee is covered by another health insurance policy or plan and setting forth details as to such coverage; and
5. It is the desire of the county to establish a Section 125 plan as is permitted by R.C. 315.171(F) under which any county officer or employee, who elects to receive a cash payment in lieu of a benefit may receive a payment which does not exceed twenty-five per cent of the cost of premiums or payments that otherwise would have been paid by the county for the coverage provided to the officer or employee.

Initially, we address your question as to whether it is permissible for a county to reimburse its employees and officers who do not qualify under the health insurance plan or policy provided by the county, or choose not to accept such coverage for all or some portion of the cost which the officer or employee incurs in payments or premiums incident to a group health insurance policy or plan secured through another employer. It is axiomatic that a county and its board of commissioners are creatures of statute, and, therefore, such entities have only those powers which are expressly conferred by statute or necessarily implied therefrom. 1983 Op. Att’y Gen. No. 83-042, at 2-162; *State ex rel. Shriver v. Board of Comm’rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (syllabus, paragraphs 1-2). A board of county commissioners generally may expend public funds only pursuant to their statutory authority, and any doubt as to the extent of such authority and the propriety of the expenditure authorized thereby must be resolved against the expenditure. 1983 Op. Att’y Gen. No. 83-042, at 2-162; *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916).

R.C. 305.171 authorizes the board of commissioners of an Ohio county to secure and to pay all or any part of the cost of a number of categories of insurance coverage or benefits including group insurance policies which provide for “hospitalization, surgical care, major medical care, disability,

dental care, eye care, medical care, hearing aids, or prescription drugs” for county officers and employees. R.C. 305.171(A)(1)(a). Subsection (F) of R.C. 305.171 empowers a board of county commissioners providing any such benefits to offer them through a plan which meets the criteria of Section 125 of the Internal Revenue Code of 1986. Such a Section 125 plan affords to county officers and employees the option to receive a cash payment in lieu of a benefit. I.R.C. § 125 (LexisNexis 2019). R.C. 305.171(G) permits a board of county commissioners to undertake an “opt-out payment” plan pursuant to which county officers are permitted to elect to take a cash payment instead of receiving any benefit which the county provides under the section. In neither case may the cash payment exceed “twenty-five per cent of the cost of premiums or payments that otherwise would be paid by the board for benefits for the county officer or employee under” a policy or plan offered by the county. R.C. 305.171(G). R.C. 305.171(H) also requires that, as a condition of receiving the allowed cash payment, the officer or employee must provide the county with a statement affirming that he or she is covered by a health insurance policy or plan other than that provided by the county. Further, the statement must set out the name of the employer which provides the same, if any, and the name of the carrier and the identifying number of the policy or plan. R.C. 305.171(H).

Your inquiry, however, asks if Vinton County may create an arrangement pursuant to which county officers and employees who do not participate in the health insurance policy or plan offered by the county may be “reimbursed” by the county for their premiums paid in conjunction with their securing such coverage through a group policy or plan provided by an employer other than the county. As is noted in 2005 Op. Att’y Gen. No. 2005-038, the word “reimburse” means “1. to pay back (money spent)” and “2. to repay or compensate (a person) for expenses, damages, losses, etc.” 2005 Op. Att’y Gen. No. 2005-038, at 2-402 (quoting *Webster’s New World Dictionary* 1197 (2d college ed. 1978)). As such, the reimbursing party makes payment for something only after the party to be reimbursed has paid out a sum.

The payments authorized under R.C. 305.171(G) are not reimbursements in that they are not computed on the basis of the amount which a county officer or employee has paid out to secure coverage through a source other than the county. Instead the payments are calculated based on the amount which the provision of coverage to the officer or employee under the county’s policy or plan would have cost the county. The amounts of the cash payments are determined by the board of county commissioners and each payment is limited to twenty-five per cent of the county’s cost for coverage, and is to no degree dependent on any outlay made by the officer or employee for coverage from a source other than the county. Further, there is no requirement under the statute that the employee make a payment to another provider and thereafter present to the county a claim seeking reimbursement. It is our conclusion, therefore, that neither R.C. 305.171 nor any other statutory provision authorizes or empowers a board of county commissioners to create a plan pursuant to which county officers and employees may be reimbursed by the county for the costs of payments or premiums which they incur in securing health insurance coverage through a group policy or plan provided by an employer other than the county.

Our opinion in this regard is bolstered by the content of R.C. 505.60 and R.C. 505.601 which relate to insurance and insurance reimbursements in the context of the officers and employees of townships. R.C. 505.60(A), in a manner consistent with R.C. 305.171(A) which is applicable to

counties, authorizes a board of township trustees to procure and pay the cost of insurance policies which provide benefits for “hospitalization, surgical care, major medical care, disability, dental care, eye care, medical care, hearing aids, [and] prescription drugs . . .” R.C. 505.60(A). R.C. 505.60(D) specifically provides, however, that, if an officer or employee is denied coverage under a health care plan provided by the township or the officer or employee chooses not to participate in that plan, “the township may *reimburse* the officer or employee for each out-of-pocket premium attributable to the coverage” which the officer or employee otherwise obtains in an amount “not to exceed the average premium paid by the township for its officers and employees” under its health plan. R.C. 505.60(D) (emphasis added). Further, under R.C. 505.601, if a board of township trustees does not procure an insurance policy or provide group health care services, the board “may *reimburse* any township officer or employee for each out-of-pocket premium attributable to the coverage provided to that officer or employee” that the officer or employee otherwise obtains. R.C. 505.601 (emphasis added). It is apparent, therefore, that the General Assembly has deemed it appropriate to include specific provisions in Chapter 505 which authorize and permit boards of township trustees to undertake a reimbursement plan such as the one you describe, but has enacted no similar empowerment as to boards of county commissioners. One must assume that the members of the General Assembly are cognizant of the content of the statutory enactments of that body, and that this omission was not inadvertent. *See NACCO Indus. v. Tracy*, 79 Ohio St. 3d 314, 316, 681 N.E.2d 900 (1997), *cert. denied*, 522 U.S. 1091 (1998); *Wachendorf v. Shaver*, 149 Ohio St. 231, 236-37, 78 N.E.2d 370 (1948).

You ask as well if Vinton County may create a Section 125 “cafeteria plan.” I.R.C. § 125 provides that, with certain enunciated exceptions and limitations, an employer may create a cafeteria plan which affords employees the option of choosing between a qualified benefit provided by the employer and a cash payment which is not included in the gross income of the employee. I.R.C. § 125. For the purposes of this section, a “qualified benefit” generally means any benefit which is not includible in the gross income of an employee with certain specific exceptions which are not germane to your inquiry. I.R.C. § 125(f)(1). As we have indicated above, R.C. 305.171(F) specifically grants a board of county commissioners authority to undertake the provision of a Section 125 plan. Such a plan may provide that any officer or employee who declines health insurance coverage under a policy or plan provided by the county will receive a cash payment in an amount determined by the county commissioners which may not exceed twenty-five per cent of the cost which the county would have incurred had the officer or employee taken that benefit. R.C. 305.171(F).

You also ask if your board of commissioners may adopt an “opt-out payment” plan pursuant to which any officer or employee may choose to opt-out of the insurance coverage provided by the county, and instead receive a cash payment. R.C. 305.171(G) allows a county to adopt such a program, which is also sometimes referred to as a “cash in lieu of benefits” plan, on the condition that the cash payment allowed not exceed twenty-five per cent of the amount of cost which the county would have incurred to provide the benefit to the officer or employee. A further requirement of such a plan is that the officer or employee must provide the county with an attestation of alternative coverage and supporting data. Such an arrangement is commonly referred to as a “conditional opt-out plan.” *See Internal Revenue Notice 2015-87, Question 9 (Dec. 16, 2015)*. It is of interest to note that such a plan is not subject to the exclusion from income provisions which apply to a Section 125 plan,

and, as such, any payments to an employee or officer of the county made pursuant to an opt-out payment plan are includable for income tax purposes in the gross income of the recipient. Further, any such payments must be included as part of any calculation of affordability of the employer's provision of insurance coverage as required by the Patient Protection and Affordable Care Act. *See* 26 U.S.C.S. § 4980H(b) (LexisNexis 2019).

Based on the foregoing, therefore, it is our opinion and you are advised that:

1. A board of county commissioners has no authority to establish a reimbursement program pursuant to which county officers and employees who are not covered by the county insurance plan or policy are reimbursed for all or some portion of the cost which the officer or employee incurs in securing such coverage under a group health care plan or policy through another source;
2. A board of county commissioners may duly establish a Section 125 cafeteria plan which provides to officers and employees of the county the option of (1) accepting coverage under a health care plan or policy provided by the county as permitted by R.C. 305.171(A), or (2) receiving a cash payment instead of the benefit. A cash payment made to any county officer or employee under the Section 125 cafeteria plan may not exceed twenty-five per cent of the cost of premiums or payments which would have been paid by the county for the benefit had it been accepted by the officer or employee; and
3. A board of county commissioners may duly establish an opt-out payment plan which provides that any officer or employee of the county who is not covered under a health care plan or policy provided by the county as permitted by R.C. 305.171 may receive a cash payment in lieu of the benefit. A cash payment made to any county officer or employee under the plan may not exceed twenty-five per cent of the cost of premiums or payments the county would have paid had the officer or employee accepted the benefit. Further, the plan must require that the officer or employee sign a statement affirming that he or she is covered under another plan or policy, and setting out the name of the employer/provider, if any, and identifying number of the policy or plan.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive, flowing style.

DAVE YOST  
Ohio Attorney General