



## MEMORANDUM

**TO:** Majority Leader Scott Fitzgerald  
**FROM:** Sarah Walkenhorst, Legislative Attorney  
**DATE:** January 23, 2019  
**SUBJECT:** Gubernatorial authority regarding litigation under chapter 165

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You have requested a memorandum describing the governor's authority regarding participation of the attorney general in litigation under ch. 165.

Under s. 165.25 (1m)—both under current law and under the law before enactment of 2017 Act 369—the governor may request the attorney general to participate in litigation on behalf of the state, or any state department, agency, official, employee or agent. Specifically, 165.25 (1m) provides:

“If requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official, employee or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested.

This language was not changed under 2017 Act 369.

The governor (at the time, Governor Walker) requested the attorney general to participate on behalf of the state in *Texas, et al., v. United States, et al.* Case 4:18-CV-00167-O, a case challenging the validity of the Patient Protection and Affordable Care Act, P.L. 111-148. Wisconsin and other states participating as plaintiffs in the action were successful at the district court, which granted plaintiffs' claim for declaratory relief. That decision is expected to be appealed.

Section 165.25 (1m) does not contain any language regarding the governor's authority to end the attorney general's participation in a case. Indeed, the provision does not include language about the attorney general's authority to end participation in a case. Rather, those issues have historically been addressed in a separate provision, s. 165.08. Under prior law, before enactment of Act 2017 369, s. 165.08 (1) provided that “[a]ny civil action prosecuted by the department on

the initiative of the attorney general, or at the request of any individual may be compromised or discontinued with the approval of the governor.” As such, under prior law, the attorney general had the authority, with gubernatorial approval, to compromise or discontinue an action. 2017 Act 369 changed this provision, removing the language regarding gubernatorial approval. Current law, s. 165.08 (1), as enacted in 2017 Act 369, states:

Any civil action prosecuted by the department by direction of any officer, department, board, or commission, or any civil action prosecuted by the department on the initiative of the attorney general, or at the request of any individual may be compromised or discontinued with the approval of an intervenor under s. 803.09 (2m) or, if there is no intervenor, by submission of a proposed plan to the joint committee on finance for the approval of the committee. The compromise or discontinuance may occur only if the joint committee on finance approves the proposed plan. No proposed plan may be submitted to the joint committee on finance if the plan concedes the unconstitutionality or other invalidity of a statute, facially or as applied, or concedes that a statute violates or is preempted by federal law, without the approval of the joint committee on legislative organization.

There is thus no provision in 165.08 (1) allowing the governor to request, require, or approve the attorney general to compromise or discontinue an action. Instead, in the absence of an intervenor under s. 803.09 (2m), it is only the Joint Committee on Finance that has the authority to approve any compromise or discontinuance of an action in which the attorney general’s participation was requested under s. 165.25 (1m).

Please feel free to contact us if you have additional questions or concerns.