No Duty To Bargain Exists Regarding Who Pays Plan Deductibles For Protective Service Unions

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The Wisconsin Employment Relations Commission issued a much-awaited decision involving the employer's duty to bargain with protective service unions over health insurance plan design and selection. In *Eau Claire County*, Dec. No. 33662 (2012), the WERC held that the legislature clearly intended to prohibit bargaining over who pays health insurance plan deductibles. Accordingly, it is illegal for an employer and a protective service union to negotiate whether the employer will pay any portion of the deductible for the health insurance plan and the impact of that decision. The decision as to whether the employer will make any contribution to an employee's deductible is unilaterally reserved to the employer.

As part of the State Budget, Act 32, the legislature created Wisconsin Statute Section 111.70(4)(mc)6 which made it illegal for an employer and a police union or fire union to negotiate regarding the "design and selection of the health care coverage plans . . . and the impact of the design and selection of the health care coverage plans on the wages, hours, and conditions of employment of the public safety employee." Many employers throughout the State believed this new statutory language reserved to management the right to determine health insurance plan deductibles, coinsurance, copayments and other plan design elements. Those employers treated this statutory language as only requiring the employer to bargain with the union over the issue of premium contribution. While those strong beliefs exist, many local protective service unions challenged that wisdom.

In *Eau Claire County*, the Police Union proposed to have the Employer pay the remaining portion of the employee's health insurance deductible after the employee paid an initial amount toward the deductible. The County alleged that the Union's proposal was illegal and no duty to bargain existed because the deductible is part of the design and selection of the health coverage plans, and in the alternative that payment of the deductible would constitute bargaining the impact of the design and selection of the health coverage plans on wages, hours and conditions of employment. WERC agreed with the County and held no duty to bargain existed.

The *Eau Claire County* decision provides clarity for employers negotiating with protective service unions. The decision affirms the significant power for municipal employers to control health insurance costs by preventing negotiations regarding whether the employer will pay any portion of the deductible for the health insurance plan or any other element of plan design. In addressing what constitutes "plan design," the WERC indicated that many common plan elements designed to encourage various behaviors and choices associated with the use of health insurance, such as copays and deductibles, are part of the plan design and thus not subject to the duty to bargain. WERC stated:

> The logical problem with the "who pays" argument is that it overlooks the fact that such a proposal turns the employer into a co-insurer of benefits, a result the Legislature clearly did not intend.
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> The normal health insurance policy is replete with cost sharing provisions in the form of deductibles, co-pays, and coverage limitations. Payment may be restricted by preferred provider options as well. In the view of the Union and our dissenting colleague, any proposal designed to shift the responsibilities for some or all of those elements of cost sharing to the employee is not part of plan design.
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> The very essence of "plan design" is making decisions which steer insureds in a particular direction and encourage various behaviors. It is illogical to assume that decisions regarding co-pays and deductibles are not integral parts of plan design.

As a result of the *Eau Claire County* decision, employers should immediately address how this decision factors into their collective bargaining strategy and how it impacts their collective bargaining agreements. At the same time, it is important that employers remember that there is still pending litigation in other circuit courts around the State and the *Eau Claire County* decision may be appealed. The decisions of those courts and possibly appellate courts may further change the landscape of collective bargaining negotiations with protective service unions.

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