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Practice Area: Labor and Employment & School Law & County and Municipal Governance

On Friday afternoon, September 14, 2012, a Dane County Circuit Court Judge issued a decision in *Madison Teachers Inc., et al v. Scott Walker*, Case No. 11CV3744. News outlets over the weekend erroneously reported that Act 10 is unconstitutional and null and void. We reviewed this decision, read what remains of Wisconsin's public sector bargaining law, and believe it is important that you are aware of the misinformation being reported about this decision.

Act 10 in its entirety was not held unconstitutional. Rather, a few sections of Act 10—including two that have already been held to be unconstitutional by Federal District Court Judge Conley, presently on appeal—were found to be unconstitutional. The primary substantive elements of Act 10 remain intact, most notably the limitations on bargaining over only "wages" with your General Municipal Employees union, and the lack of any interest arbitration process to "force" settlements with your Union. This means your ability to manage and control your work environments largely remains intact.

This decision only found the following statutory sections created by Act 10 unconstitutional:

- **Restricting Mandatory Bargaining over Wages to only Total Base Wages. WIS. STAT. § 111.70(4)(mb)**. This statutory provision prohibited bargaining with general municipal employee unions over the issue of wages but only "total base wages" up to a CPI cap and specifically excluded bargaining over any other compensation including overtime, premium pay, merit pay, and other forms of compensation.
- **Referendums regarding Bargaining Above the Total Base Wages CPI Cap. WIS. STAT. §§ 66.0506 and 118.245**. These statutory provisions in conjunction with Section 111.70(4)(mb) required that referendum be held before the employer could bargain regarding increase in total base wages above the CPI cap.
- **Limiting Fair Share Agreements to only Public Safety and Transit Employee Unions. WIS. STAT. § 111.70(1)(f)**. This statutory definition limited fair share agreements to only transit employee and public safety unions.
- **Dues Deduction and Requiring Annual Recertification Elections. WIS. STAT. §§ 111.70(3g) and 111.70(4)(g)3**. These statutory provisions restricted an employer from deducting union dues from employee pay and then remitting payment to the Union, and also required annual recertification elections of unions.
- **City Of Milwaukee Pension Plan Employee Contribution. WIS. STAT. § 62.623**. This statutory provision required a pension contribution of the employee share by City of Milwaukee employees to the City's pension System.

All other aspects of Act 10 and Section 111.70, Wis. Stats., were essentially left unchanged. For example, Section 111.70(1)(a), which specifies that an employer must only bargain with a general municipal employee union over the issue of "wages" still remains. The employer must still bargain with public safety and transit unions regarding the broader issues of wages as well as hours and working conditions. Additionally, while interest arbitration still exists for public safety and transit employees, no similar dispute resolution exists for bargaining disputes involving general municipal employee unions. Thus, the current practice of negotiating with general municipal employee unions in good faith until an impasse is reached and then implementation of the employer's last best final offer absent an agreement is the process that remains.

As this process unfolds and more information becomes available, following are some helpful thoughts and reminders for the interim:

- **Don't Overreact.** As referenced earlier, this circuit court decision is being touted by unions as holding Act 10 as unconstitutional. That is not the case. Just like past decisions involving Act 10, there will be uncertainty fueled by misinformation. We can all recall the environment in March 2011 when a Dane County Circuit Court Judge found that passage of Act 10 violated Wisconsin's Open Meetings Law, and in March 2012 when Federal District Court Judge Conley declared two of the statutory provisions as unconstitutional involving dues deduction and annual recertification elections. Accordingly, careful decisions and avoiding knee-jerk reactions are of critical importance.
- **Prepare for Contacts by the Union.** We expect that several employers will be contacted by local union leadership and bargaining unit representatives demanding to immediately commence bargaining with a general municipal employees union. The complex issues associated with ongoing federal litigation and this decision necessitate that each community carefully prepare its strategy for handling this issue. The law does not require the employer to engage in the collective bargaining process at that moment. When contacted, the smartest approach the employer can take is to kindly inform that individual that the employer will confer with management and decide on an appropriate course of action. Moreover, even if Judge Colas' decision is not stayed pending the appeal, fair share and dues check off are now likely only permissive, not mandatory, subjects of bargaining, so agreement on those subjects must still be reached before they become effective. Further, bargaining with General Municipal Employees is still limited to "wages," which may still be limited to "Total Base Wages" as defined by the WERC.
- **Be Mindful of Stray Comments.** Because of the information reported about this decision, there will be a tremendous amount of concern and excitement among employees. Be mindful of comments attributable to the employer including any promises or assurances to modify policies, to bargain over the employee handbook, or to reinstate an expired collective bargaining agreement or extend a collective bargaining agreement that expires at the end of this contract term.
- **Expect appeals.** The Wisconsin Department of Justice announced they intend to seek a stay of this Circuit Court decision pending an appeal of this case. How the decision will be appealed and the length of time that it will take is unknown, but we should not expect a final decision for at least several months, and likely longer. After reviewing this decision and the Federal District Court Opinion issued in March 2012, we believe there is a good chance this circuit court decision will be overturned on appeal. Of special interest is that Judge Conley, in his March 2012 decision striking down other parts of Act 10, specifically concluded that having differing scopes of bargaining for different employee groups is "rationally related to a legitimate governmental interest" (pg. 867) and therefore is constitutional. This is contrary to the conclusions of Judge Colas.
- **Recognize Challenges will Arise.** As many employers are in the process of implementing employee handbooks, modifying health insurance plans, and implementing wage studies, many unique issues will arise for each community related to this decision. We anticipate there will be challenges by unions, but they will choose their local test cases wisely. Employers can still achieve their desired results, but should act cautiously at this time and engage in well-calculated and thoughtful decisions.
